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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1937

## No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL., PETITIONERS,

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 2, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1937

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

**IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION**

W. E. Brusselback, St. Louis, Missouri, W. I. Bell, Stephen D. Forst, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, William M. Watson, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, Illinois, Plaintiffs,

vs.

Herman D. Arnovitz, J. D. Artz, John W. Baker, H. D. Bassett, Erma P. Beatty, Charles B. Beckel, Mabel G. Bentz, Norman A. Bentz, Jacob Bigler, Arbella R. Bimm, William Brooks, Miriam Mathiot Brown, Zimmer Bulchan, Norman Carter, Mary E. Clunet, Ezra E. Coler, Mary Currigan, Helen Frances Smith Daugherty, Theodore C. Dye, C. J. Ferneding, Bernard J. Focke, Virginia Gohn, E. J. B. Gorman as Trustee for G. H. Gorman, W. A. Gravett, F. C. Gray, Richard Allison Grimm, Eliza Phillips Hall, William E. Herbst, Zola B. Horrell, Dorothy Jane Huemmer, James M. Irvin as Executor of [fol. 2] the Estate of Obed W. Irvin, deceased, John Burlin Johnson, Charles L. Jones, Edith P. Joslin, Cora Manley Kendall, Mary L. Kershner, Henry C. Keve, J. Ritner Kinnard, Merretta S. Kirby, Peter W. Klinger, Paul Knedler, Karl Kroemer, Nicholas J. Kuntz, Edward T. Lingham, Georgiana D. Malone, Katherine G. Mathiot, Sarah H. McKee, Florence E. Meuche, Karl S. Meuche, Charles A. Miller, Alice May, George Morrill, Eliot Winthrop Morrill, Henry E. Myers, Jacob A. Oneth, Frances I. Parrott, John E. Parrott, Jr., Fannie H. Peirce, J. Elliott Peirce, Kate Pierce, Mary C. Prugh, Alice Jane Russum, Ida May B. Ryan, Francis D. Schnacke, Gladys L. Smith, Robert E. Stoehr, The Charles Sucher Packing Co., Edward T. Turner and Wellmore B. Turner as trustees under the Will of Earl H. Turner, deceased, Frank E. Watt, Mina R. Watt, Viola M. Weakley, Virginia M. Weakley, William Conklin Weakley, The Third National Bank & Trust Company as Executor of the Estate of George W. Weimer, deceased. The Western Securities Company, Emma M. Wiedenbein, Cora A. Wig-

gim, Lyda B. Wiggim, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman, George B. Armstrong. T. J. Bailey or Lucy Bailey, as joint tenants and not as tenants in common, with right of survivorship, Hugh A. Baldwin. Mabel F. Beane, Carle W. Beane and Mabel F. Beane as joint tenants, with right of survivorship, and not as tenants in common, Albert J. Berberich, Emma F. Bock, John W. Brown, Estella K. Buche, Henry V. Butler, Andrew J. Christopher, Sallie Christopher, Charles S. Clark, Jr., C. S. Clark, Sr., Emma C. Cline, Emma Coats, Albert Goodwin Coulson, Austin A. Coulson, Jr., Pauline J. Day, J. F. Detrick, Nelle Dingledine, L. Dale Dorney, Dorothea Fismer, Ada L. Ford, Charles A. Ford, Harold R. Gebhart, J. L. P. Hannaford, William D. Haar, Mary McD. Harris, Samantha B. Harter, Dr. W. M. Henry, Helen Herzog, Elmer B. Hoyle, Glen O. Huron, Ethel F. Kaufman, Jacob Kendell, Harvey E. Kiess, Jost J. Kundert, Orella Locke, Chryst H. Loeffler, Nellie Maddock, Carlton G. Mitchell, Lulu Nixon, Lottie E. Norton, John Plummer, Lewis D. Riegle, Ada C. Ruhl, Jessie B. Rupp, Rose E. Ryan, Jacob L. Safier, Elizabeth C. H. Sanborn, Mary White Sayre, Maud Schreel, Ruth Rauh Stern, Robert W. Stevenson, Delmar G. Ubersax, John D. Wachman, Callie B. Webb, John M. Wehrly and Pearl B. Wehrly as joint tenants with right of survivorship but not as tenants in common, and Clara M. Wilgus, Defendants

[fol. 3] BILL OF COMPLAINT—Filed August 8, 1935

To the Honorable Judge of the District Court of the United States, in and for the Western Division of the Southern District of Ohio:

The above named plaintiffs bring this bill in equity against the defendants, and respectfully represent:

1. Jurisdiction is predicated upon the fact that the present action arises under the Act of Congress known as the Federal Farm Loan Act (U. S. C. A. Title 12, Chapter 7). Jurisdiction is also predicated upon diversity or citizenship. The matter in controversy exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

2. Plaintiffs are citizens and residents of the State of Missouri and the State of Illinois. They severally own

bonds issued by the Chicago Joint Stock Land Bank, in the amounts (representing the par value of such bonds) set opposite their respective names:

| | Amount of bonds |
|---|---|
| W. E. Brusselback | $4,000.00 |
| W. I. Bell, Stephen D. Forst, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, and William M. Watson, as Trustees of the Retirement Board of the Park Employees, Annuity and Benefit Fund of Chicago, Illinois | 128,000.00 |

3. The defendants are listed in Exhibit "A" which is attached to and made a part of this bill. All of the defendants are citizens of the State of Ohio. Their residences are as set forth opposite their respective names on Exhibit "A." The defendants, respectively, are stockholders of the Chicago Joint Stock Land Bank, and each of the defendants owns the number of shares set opposite his name on Exhibit "A." Defendants, Robert E. Cowden, Francis D. Schnacke, Frank W. Nicholas and A. M. Zimmerman, are incorporators and/or officers of the Western Securities Company, a corporation, which Company held seven hundred fifty-nine (759) shares of Chicago Joint Stock Land Bank stock. Plaintiffs allege that The Western Securities Company, a corporation, was organized as a subterfuge to escape the statutory liability of ownership of shares of Chicago Joint Stock Land Bank. Plaintiffs allege that the names of the stockholders of The Western Securities Company together with a number of shares owned by each, are unknown to these plaintiffs and that discovery pursuant [fol. 4] to the provision of Equity Rule 58 is necessary in order to determine the names of said stockholders of said corporation and the number of shares held by each.

4. The Chicago Joint Stock Land Bank (hereafter for brevity called the Bank) was and is a joint stock land bank, organized and existing under the Act of Congress known as the Federal Farm Loan Act. Such bank was located in Federal Land Bank District No. 6, and had its principal place of business in the City of Chicago, in the State of Illinois.

5. Plaintiffs are bondholders and creditors of such Bank, and bring this suit as such bondholders and creditors, on

their own behalf and on behalf of all other bondholders and creditors of such Bank, including all such bondholders and creditors as may elect to join and participate herein.

6. The Bank has outstanding capital stock of the par value of Four Million Dollars ($4,000,000.00), divided into Forty Thousand (40,000) shares of the par value of One Hundred Dollars ($100.00) each. Such shares were originally sold for the sum of approximately Four Million Dollars ($4,000,000.00) in cash, which sum was paid into the treasury of the Bank.

7. The Bank was incorporated in the year 1917. From that time until October 1, 1932, the Bank conducted its business under and pursuant to the provisions of the Federal Farm Loan Act. Its capital was invested in farm mortgages and Government bonds, and from time to time the Bank issued its own bonds, as permitted by such Act of Congress. The Bank thus issued its own bonds having a face value of more than $42,000,000.00, and all of such bonds were sold to the public pursuant to the provisions of such Act of Congress. All of such bonds were sold for par, or approximately par, and the proceeds thereof were invested, for the most part, in farm mortgages covering farm properties situated in the states of Illinois and Iowa.

8. On October 1, 1932, the Federal Farm Loan Board, acting pursuant to such Act of Congress, declared such Bank to be insolvent, and directed that such Bank discontinue its active operations, and that its assets be turned over to John B. Gallagher, who was appointed by such Board as receiver for such Bank. Continuously since that date, said Gallagher has acted as such receiver, and as such has been engaged in liquidating the assets of the Bank, [fol. 5] with a view to the payment of its debts, as far as possible.

9. On or about October 1, 1932, certain bondholders of the Bank, who owned bonds largely in excess of $3,000, filed their bill in the United States District Court for the Northern District of Illinois, Eastern Division, against the stockholders of the Bank, for the purpose of enforcing the stockholders' liability created and provided for by such Act of Congress. In such bill there were named as defendants the Chicago Joint Stock Land Bank, and all of the

stockholders of such Bank who appeared of record as stockholders as of October 1, 1932. Such stockholders exceeded one thousand in number. Many of them resided in the State of Illinois, and many others resided outside of Illinois. Service was had upon all of the stockholders who resided in Illinois, and who could be found. No service was attempted upon non-resident stockholders, as no such service was permissible under the Federal statutes. A comparatively small number of the defendants who were served defaulted, but for the most part those defendants who were served appeared by counsel and filed answers contesting plaintiffs' right to recover. The cause was referred to a Master, and protracted hearings were had. The Master found that the Bank was insolvent, in that its liabilities exceeded the amount of its assets, to the extent of approximately Twelve Million Dollars ($12,000,000). The Master found that an assessment of one hundred per cent against the stockholders would be necessary, and recommended a decree wherein such an assessment would be levied. The Court approved the report of the Master, and entered a decree assessing the stockholders of the Bank for an amount equal to one hundred per cent of the par value of the shares held by them; and the defendants who were served were directed to pay over such assessments to John B. Gallagher, who was appointed by the Court as receiver to receive the amounts paid, and to disburse the same to the creditors, pursuant to the Court's order.

10. Plaintiffs are advised, and therefore allege, that the above mentioned decree of the United States District Court for the Northern District of Illinois is effective and binding not only upon the Illinois stockholders who were served with process in such cause, but is equally effective and binding upon all of the stockholders of the Bank, wherever residing, and whether of record or otherwise, insofar as such decree determines and fixes the necessity and extent of the [fol. 6] assessments for which the stockholders of such Bank are liabile. So it is that such decree effectively adjudicates against the defendants herein that all of the stockholders of the Bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent of the par value of the shares held by them, respectively.

Plaintiffs pray:

(a) That the writ of subpœna may be directed to the Marshal of the United States District Court for the Southern District of Ohio, against the defendants resident in such District, and that duplicate writs may be directed to the Marshals of other districts of the State of Ohio, against the defendants residing in such Districts, respectively pursuant to U. S. C. A. Title 28, Section 113.

(b) That defendants may be required to answer, pursuant to the equity rules.

(c) That the present action may be treated and regarded in all respects as a class suit wherein and whereby these plaintiffs sue as the representatives of all bondholders and creditors of the Bank, for the purpose of enforcing the assessment heretofore levied against the stockholders of the Bank resident in the State of Ohio, to the end that there may be provided a fund to be administered by this Court for the equal benefit of the plaintiffs herein and all other creditors of the Bank who may desire to take advantage of this proceeding.

(d) That the stockholders who are defendants hereto, or who may be made defendants hereto, may be decreed and ordered to pay the amount of their respective assessments.

(e) That a receiver may be appointed to take charge of the fund realized by collections from the defendants.

(f) That the sums thus realized may be administered by this Court, as a court of equity, and distributed ratably and equitably among the creditors of the Bank, in such manner as the Court may direct.

(g) That plaintiffs may have such discovery, from time to time, as may be needed, pursuant to the provisions of Equity Rule 58.

(h) That plaintiffs may be permitted to amend their bill, from time to time, so as to bring in additional stockholders, or others who may be liable to assessment.

[fol. 7] (i) That all other creditors and bondholders be enjoined from prosecuting separate actions to enforce the stockholders' liability herein sought to be enforced, to the end that the enforcement of such liability may be equitable and ratable, and equally for the benefit of all creditors.

And plaintiffs pray for such other and different relief as may be agreeable to equity.

Townley, Wild, Campbell & Clark, Legler & Murray,
Attorneys for Plaintiffs.

*Duly sworn to by Geo. R. Murray. Jurat omitted in printing.*

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PRÆCIPE

To the Clerk:

Issue summons together with copy of Interrogatories directed to Robert E. Cowden and Francis D. Schnacke, to the Marshal for service upon the defendants returnable according to law. Endorse: "Bill in Equity for enforcing assessment against stockholders of Chicago Joint Stock Land Bank resident in Ohio; for decree ordering defendants to pay their respective assessments; for the appointment of a Receiver; for distribution of funds ratably among the creditors; for discovery; for injunction; for equitable relief and costs of suit."

Townley, Wild, Campbell & Clark, Legler & Murray,
Attorneys for Plaintiffs.

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[fol. 8] EXHIBIT "A" TO COMPLAINT

| Name | Address | No. of shares |
|---|---|---|
| Arnovitz, Herman D., | 343 Park Drive, Dayton, Ohio | 25 |
| Artz, J. D., | 1141 North Main Street, Dayton | 60 |
| Baker, John W., | 240 Grafton Ave., Dayton | 20 |
| Bassett, H. D., | 105 Willowood Drive, Dayton | 10 |
| Beatty, Erma P., | 1922 Burbank Drive, Dayton | 35 |
| Beckel, Charles B., | 226 S. Jefferson St., Dayton | 18 |
| Bentz, Mabel G., | 133 Best Street, Dayton | 10 |
| Bentz, Norman A., | 133 Best Street, Dayton | 40 |
| Bigler, Jacob, | R. F. D. No. 1, Troy Pike, Dayton | 50 |
| Bimm, Arabella R., | 319 Volusia Ave., Dayton | 20 |
| Brooks, William, | 1401 Salem Ave., Dayton | 10 |
| Brown, Mrs. Miriam Mathiot, | 51 Harmon Terrace, Dayton | 18 |
| Bulchan, Zimmer, | % Greene & Brock, 304 Third National Bldg., Dayton | 18 |

| Name | Address | No. of shares |
|---|---|---|
| Carter, Norman, | 2316 Germantown Street, Dayton | 23 |
| Clunet, Mary E., | Brier Hill Road, Dayton | 1 |
| Coler, Ezra E., | 1624 Grand Ave., Dayton | 5 |
| Currigan, Miss Mary, | 22 Central Ave., Dayton | 16 |
| Daugherty, Helen Frances Smith, | 703 Oxford Ave., Dayton | 25 |
| Dye, Theodore C., | 1515 Woodstock Drive, Dayton | 21 |
| Ferneding, C. J., | 269 Park Drive, Dayton | 20 |
| Focke, Bernard J., | 615 Xenia Ave., Dayton | 10 |
| Gohn, Miss Virginia, | 112 Squirrel Rd., Dayton | 10 |
| Gorman, E. J. B., Trustee for G. H. Gorman, | 310 W. First Street, Dayton | 2 |
| Gravett, W. A., | 825 Far Hills Ave., Dayton | 50 |
| Gray, Dr. F. C., | 519 Plymouth Ave., Dayton | 5 |
| Grimm, Richard Allison, | 225 Lonsdale Ave., Dayton | 35 |
| Hall, Miss Eliza Phillips, | 1640 S. Main St., Dayton | 4 |
| Herbst, William E., | 22 Marshall Street | 20 |
| Horrell, Zola B., | 1727 Auburn Ave., Dayton | 100 |
| Huemmer, Dorothy Jane, | 723 Keowee St., Dayton | 557 |
| Irvin, James M., Executor of Estate of Obed W. Irvin, deceased, | 800 Oakwood, Ave., Dayton | 30 |
| Johnson, John Burlin, | 447 W. Hudson Ave., Dayton | 10 |
| Jones, Charles L., | 304 Third Natl. Bldg., Dayton | 6 |
| Joslin, Mrs. Edith P., | 2122 Wayne Ave., Dayton | 20 |
| Kendall, Cora Manley, | 109 Central Ave., Dayton | 20 |
| Kershner, Mary L., | 112 N. Western Ave., Dayton | 170 |
| Keve, Henry C., | 1334 E. Third St., Dayton | 5 |
| Kinnard, J. Ritner, | 79 Park Road, Dayton | 150 |
| [fol: 9] | | |
| Kirby, Mrs. Merretta S., | 1316 Colwick Dr., Dayton | 100 |
| Klinger, Peter W., | 235 Grafton Ave., Dayton | 105 |
| Knedler, Paul, | 1310 E. First St., Dayton | 82 |
| Kroemer, Karl, | 647 Oak Street, Dayton | 10 |
| Kuntz, Nicholas J., | 632 Bellemonte Park, N. Dayton | 50 |
| Lingham, Edward T., | 71 Central Ave., Dayton | 50 |
| Malone, Mrs. Georgiana D., | 190 Cambridge Ave., Dayton | 17 |
| Mathiot, Mrs. Katherine G., | 647 Grand Ave., Dayton | 3 |
| McKee, Mrs. Sarah H., | 238 Northview Rd., Dayton | 20 |
| Meuche, Mrs. Florence E., | 472 Irving Ave., Dayton | 3 |
| Meuche, Karl S., | 472 Irving Ave., Dayton | 5 |
| Miller, Charles A., | 24 Huffman Ave., Dayton | 20 |

| Name | Address | No. of shares |
|---|---|---|
| Morrill, Mrs. Alice May George | 513 Union Trust Bldg., Dayton | 25 |
| Morrill, Eliot Winthrop | 513 Union Trust Bldg., Dayton | 78 |
| Myers, Henry E. | 229 Perrine St., Dayton | 15 |
| Oneth, Jacob A. | 316 Richmond Ave., Dayton | 14 |
| Parrott, Frances I. | 245 Orchard Ave., Dayton | 1 |
| Parrott, John E., Jr. | 240 Dixon Ave., Dayton | 1 |
| Peirce, Fannie H. | 339 Kramer Rd., Dayton | 25 |
| Peirce, J. Elliott | 339 Kramer Rd., Dayton | 5 |
| Pierce, Mrs. Kate | 1711 Radcliffe Rd., Dayton | 7 |
| Prugh, Mary C. | 61 E. Hudson Ave., Dayton | 45 |
| Russum, Miss Alice Jane | 646 St. Nicholas Ave., Dayton | 20 |
| Ryan, Ida May B. | % George P. Bassett, 1326 N. Main St., Dayton | 9 |
| Schnacke, Francis D. | Winters Natl. Bank Bldg., Dayton | 5 |
| Smith, Miss Gladys L. | 700 Far Hills Ave., Dayton | 10 |
| Stoehr, Robert F. | 1927 Benson Dr., Dayton | 11 |
| The Charles Sucher Packing Co. | North Western Ave., Dayton | 75 |
| Turner, Edward T. and Wellmore B. Turner, trustees under the will of Earl H. Turner, dec'd. | 228 Central Ave,. and 201 Beckel Bldg., Dayton | 25 |
| Watt, Frank E. and Mina R. | 752 Kennilworth Ave., Dayton | 20 |
| Weakley, Mrs. Viola M. | 518 W. Second St., Dayton | 25 |
| Weakley, Virginia M. | 355 W. First St., Dayton | 3 |
| Weakley, William Conklin | 355 W. First St., Dayton | 17 |
| Third National Bank & Trust Co., Executor of the Estate of George W. Weimer, dec'd. | N. Main St., Dayton | 35 |
| [fol. 10] Western Securities Co. | % Craighead, Cowden, Smith & Schnacke, Winters Natl. Bank Bldg., Dayton | 759 |
| Wiedenbein, Emma M. | 232 N. Wilkinson St., Dayton | 135 |
| Wiggim, Miss Cora A. | 410 Salem Ave., Dayton | 21 |
| Wiggim, Miss Lyda B. | 410 Salem Ave., Dayton | 26 |
| Robert E. Cowden | Winters Natl. Bank Bldg., Dayton | Incorporators and (or) officers of Western Securities Co. a Corporation |
| Frank W. Nicholas | Municipal Bldg., Dayton | |
| A. M. Zimmerman | 924 Xenia Ave., Dayton | |
| Armstrong, George B. | Laurelville | 50 |

| Name | Address | No. of shares |
|---|---|---|
| Bailey, T. J. or Lucy Bailey, as joint tenants and not as tenants in common, with right of survivorship, | Citizens Natl. Bank, McConnelsville | 40 |
| Baldwin, Hugh A. | 347 E. State St., Columbus | 20 |
| Beane, Mrs. Mabel F. | West Manchester | 4 |
| Beane, Carl W. and Mabel F., as joint tenants, with right of survivorship, and not as tenants in common, | West Manchester | 4 |
| Berberich, Albert J. | Box 721, Piqua | 2 |
| Bock, Mrs. Emma F. | Hamilton | 10 |
| Brown, John W. | 626 Caldwell St., Piqua | 35 |
| Buche, Mrs. Estella K. | Scarlet Oaks Home, Cincinnati | 12 |
| Butler, Henry V. | Box 1161, Columbus | 5 |
| Christopher, Andrew J. | Jamestown | 7 |
| Christopher, Mrs. Sallie | Jamestown | 31 |
| Clark, Charles S. Jr. | Wakeman | 7 |
| Clark, C. S., Sr. | Wakeman | 12 |
| Cline, Mrs. Emma C. | 210 E. South St., Arcanum | 10 |
| Coats, Mrs. Emma | Tippecanoe City | 5 |
| Coulson, Albert Goodwin | Malta | 60 |
| Coulson, Austin A. Jr. | Malta | 60 |
| Day, Pauline J. | 212 Ohio St., New Richmond | 6 |
| Detrick, J. F. | Tippecanoe City | 25 |
| Dingledine, Nelle | Arcanum | 10 |
| Dorney, L. Dale | 205 E. Lima St., Findlay | 5 |
| Fismer, Miss Dorothea | 125 E. Norwich Ave., Columbus | 20 |
| Ford, Mrs. Ada L. | Box 1044, Columbus | 10 |
| Ford, Charles A. | West Manchester | 5 |
| Gebhart, Harold R. | Miamisburg, R. F. D. No. 1 | 5 |
| Hannaford, J. L. P. | 4403 Ashland Ave., Norwood | 10 |
| Harr, William D. | Troy | 10 |
| Harris, Mrs. Mary McD. | Box 584, Athens | 20 |
| [fol. 11] Harter, Mrs. Samantha B. | New Madison | 8 |
| Henry, Dr. W. M. | Jamestown | 7 |
| Herzog, Mrs. Helen | 2562 Scottwood Ave., Toledo | 40 |
| Hoyle, Elmer B. | 1305 Washington Ave., Piqua | 2 |
| Huron, Glen O. | 1026 Union Trust Bldg., Cincinnati | 20 |
| Kaufman, Ethel F. | % Toledo Trust Co., Toledo | 4 |
| Kendel, Jacob | Covington | 6 |
| Kiess, Harvey E. | 472 East Oakwood Ave., Bucyrus | 5 |
| Kundert, Jost J. | Osborn | 10 |
| Locke, Orella | 2421 Hudson Ave., S. Norwood | 3 |

| Name | Address | No. of shares |
|---|---|---|
| Loeffler, Chryst H., | Piqua | 10 |
| Maddock, Miss Nellie, | North Ridgeville | 5 |
| Mitchell, Carlton G., | 626 Park Ave., Hamilton | 10 |
| Nixon, Lulu, | 1101 Cardinal St., Steubenville | 9 |
| Norton, Lottie E., | 39 Manitou Dr., Maumee | 100 |
| Plummer, John, | 809 E. Mansfield St., Bucyrus | 5 |
| Riegle, Lewis D., | Park Ave., Greenville | 7 |
| Ruhl, Ada C., | % O'Donnell, O'Donnell & O'Donnell, Covington | 14 |
| Rupp, Mrs. Jessie B., | 14561 Madison Ave., Lakewood | 4 |
| Ryan, Miss Rose E., | 1603 Treadway Ave., Cleveland | 100 |
| Safier, Jacob L., | % I. & S. Bing Co., 8th & Sycamore Sts., Cincinnati | 4 |
| Sanborn, Elizabeth C. H., | 90 14th Ave., Columbus | 5 |
| Sayre, Mary White, | 88 South Drexel Ave., Columbus | 30 |
| Schreel, Mrs. Maud, | Greenville | 5 |
| Stern, Mrs. Ruth Rauh, | 2580 Norfolk Rd., Cleveland | 5 |
| Stevenson, Robert W., | % Carnegie Library, Columbus | 10 |
| Ubersax, Delmar G., | 2185 Bunts Road, Lakewood | 55 |
| Wachman, John D., | 419 Plum St., Cincinnati | 25 |
| Webb, Callie B., | East Columbus | 20 |
| Wehrly, John M. and Pearl B., | as joint tenants with right of survivorship, but not as tenants in common, West Manchester | 5 |
| Wilgus, Clara M., | R. F. D. No. 5, Brookville | 30 |

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[fol. 12] IN UNITED STATES DISTRICT COURT

MOTION FOR APPOINTMENT OF RECEIVER—Filed September 13, 1935

Now comes the plaintiffs and move the Court for the appointment of John B. Gallagher as local Receiver herein.

Townley, Wild, Campbell & Clark, Legler & Murray,
Attorneys for Plaintiffs.

Passed Bill 4th.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO FILE AMENDED BILL—Filed September 24, 1935

Now comes the plaintiffs herein and move the Court for leave to file an amended Bill in Equity forthwith.

Townley, Wild, Campbell & Clark, Legler & Murray, Attorneys for Plaintiffs.

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IN UNITED STATES DISTRICT COURT

ENTRY GRANTING LEAVE TO FILE AMENDMENT TO BILL—Filed October 7, 1935

On motion of the plaintiffs leave is given to said plaintiffs to file an amendment to the Bill in Equity forthwith, subject to the rights of the defendants to file objections thereto, to all of which all the defendants except.

Approved:

Nevin, Judge.

Legler & Murray, Attorneys for Plaintiffs. R. E. Cowden, F. D. Schnacke, Roy G. Fitzgerald, Counsel for Defendants.

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[fol. 13] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL—Filed October 7, 1935

Pursuant to an order of the Court entered this day, W. E. Brusselback, and W. I. Bell, Stephen D. Forst, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, William M. Watson, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, Illinois, plaintiffs herein, hereby amend their bill in equity heretofore filed in this case as follows:

1. By filing the following paragraph 3a as part of said bill in equity the said paragraph to become, be and stand as, paragraph 3a of said bill;

3a. That H. D. Bassett who is named as a defendant in this cause, died on the 27th day of December, 1932, a resident and inhabitant of Ohio; that said H. D. Bassett left

a last Will and Testament appointing as Executor of his estate one Robert G. Bassett, 3310 Home Ave., Dayton, Ohio; that said last Will and Testament was duly probated in the Probate Court of Montgomery County, Ohio; that on the 21st day of April, 1933, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to Robert G. Bassett as Executor of the Estate of said H. D. Bassett, and that said Robert G. Bassett is now acting as such Executor of the Estate of said H. D. Bassett.

That C. J. Ferneding who is named as a defendant in this cause, died on the 29th day of June, 1931, a resident and inhabitant of Ohio; that said C. J. Ferneding left a last Will and Testament appointing as Executors of his estate H. L. Ferneding, 125 Wisteria Drive, Dayton, Ohio, T. A. Ferneding, 1334 East Third Street, Dayton, Ohio, and Marla F. Keve, 1334 East Third Street, Dayton, Ohio; that said last Will and Testament was duly probated in the Probate Court of Montgomery County, Ohio; that on the 25th day of July, 1931, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to H. L. Ferneding, T. A. Ferneding and Marie F. Keve as Executors of the Estate of said C. J. Ferneding.

That Bernard J. Focke who is named as a defendant in this cause, died on the 7th day of May, 1932, a resident and inhabitant of Ohio; that said Bernard J. Focke left a last Will and Testament appointing as Executor of his estate Urban G. Focke, 1537 N. Euclid Ave., Dayton, Ohio; that said last Will and Testament was duly probated in the Pro-[fol. 14] bate Court of Montgomery County, Ohio; that on the 26th day of May, 1932, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to Urban G. Focke as Executor of the Estate of said Bernard J. Focke, and that said Urban G. Focke is now acting as such Executor of the Estate of said Bernard J. Focke.

That F. C. Gray who is named as a defendant in this cause, died on the 22nd day of October, 1932, a resident and inhabitant of Ohio; that said F. C. Gray left a last Will and Testament appointing as Executor of his estate Daniel Nevins, 809 U. B. Building, Dayton, Ohio; that said last Will and Testament was duly probated in the Probate Court of Montgomery County, Ohio; that on the 1st day of November, 1932, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to Daniel

Nevins as Executor of the Estate of said F. C. Gray and that said Daniel Nevins is now acting as such Executor of the Estate of said F. C. Gray.

That William E. Herbst who is named as a defendant in this cause, died on the 27th day of November, 1934, a resident and inhabitant of Ohio; that said William E. Herbst left a last Will and Testament appointing as Executor of his estate Frank H. Herbst, 304 Richmond Avenue, Dayton, Ohio; that said last Will and Testament was duly probated in the Probate Court of Montgomery County, Ohio; that on the 12th day of December, 1934, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to Frank H. Herbst as Executor of the Estate of William E. Herbst, and that said Frank H. Herbst is now acting as such Executor of the Estate of William E. Herbst.

That Obed W. Irvin who is named as a defendant in this cause, died on the 17th day of May, 1935, a resident and inhabitant of Ohio; that said Obed W. Irvin died intestate and that on the 21st day of June, 1935, Letters of Administration were issued by the Probate Court of Montgomery County, Ohio, to James M. Irvin, 800 Oakwood Avenue, Dayton, Ohio, as Administrator of the Estate of Obed W. Irvin, and that said James M. Irvin is now acting as such Administrator of the Estate of Obed W. Irvin.

That Frances I. Parrott who is named as a defendant in this cause died on the 13th day of July, 1934, a resident and inhabitant of Ohio; that said Frances I. Parrott left a last Will and Testament appointing as Executrix of her estate Mary E. P. Clunet, Briar Hill Road, Dayton, Ohio; [fol. 15] that said last Will and Testament was duly probated in the Probate Court of Montgomery County, Ohio; that on the 19th day of July, 1934, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to Mary E. P. Clunet as Executrix of the Estate of Frances I. Parrott, and that said Mary E. P. Clunet is now acting as such Executrix of the Estate of said Frances I. Parrott.

That George W. Weimer who is named as a defendant in this cause, died on the 10th day of February, 1933, a resident and inhabitant of Ohio; that said George W. Weimer left a last Will and Testament appointing The Third National Bank and Trust Company, North Main Street, Dayton, Ohio, as Executor of his estate; that said last Will and

Testament was duly probated in the Probate Court of Montgomery County, Ohio; that on the 1st day of March, 1933, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to The Third National Bank and Trust Company as Executor of the Estate of George W. Weimer, and that said The Third National Bank and Trust Company is now acting as such Executor of the estate of said George W. Weimer.

That Sallie Christopher who is named as a defendant in this cause, died on the 25th day of March, 1935, a resident and inhabitant of Ohio; that said Sallie Christopher left a last Will and Testament appointing A. J. Christopher, Jamestown, Ohio, as Executor of her estate; that said last Will and Testament was duly probated in the Probate Court of Greene County, Ohio; that on the 28th day of March, 1935, Letters Testamentary were issued by said Probate Court of Greene County, Ohio, to said A. J. Christopher as Executor of the Estate of Sallie Christopher, and that said A. J. Christopher is now acting as such Executor of the Estate of said Sallie Christopher.

That Ada L. Ford who is named as a defendant in this cause, died on the 16th day of February, 1935, a resident and inhabitant of Ohio; that said Ada L. Ford left a last Will and Testament appointing as Executor of her estate Frank C. Anderson, Mt. Vernon, Ohio; that said last Will and Testament was duly probated in the Probate Court of Franklin County, Ohio; that on the 27th day of February, 1935, Letters Testamentary were issued by said Probate Court of Franklin County, Ohio, to Frank C. Anderson, as Executor of the Estate of Ada L. Ford, and that said Frank C. Anderson is now acting as such Executor of the Estate of said Ada L. Ford.

[fol. 16] That Ada C. Ruhl who is named as a defendant in this cause, died on the 31st day of August, 1932, a resident and inhabitant of Ohio; that said Ada C. Ruhl left a last Will and Testament appointing as Executor of her estate one L. A. Ruhl, Covington, Ohio; that said Last Will and Testament was duly probated in the Probate Court of Miami County, Ohio; that on the 17th day of September, 1932, Letters Testamentary were issued by said Probate Court of Miami County, Ohio, to L. A. Ruhl as Executor of the Estate of Ada C. Ruhl, and that said L. A. Ruhl is now acting as such Executor of the Estate of said Ada C. Ruhl.

That each of said estates hereinbefore named and their respective executors and said administrator as heretofore set forth are liable as such, under the laws of the United States mentioned in said bill, to these plaintiffs and other creditors of the Chicago Joint Stock Land Bank.

That Cora A. Wiggim who is named as a defendant in this cause died on the 16th day of April, 1933, a resident and inhabitant of Ohio; that said Cora A. Wiggim left a last Will and Testament appointing as Executrix of her estate, one Lyda B. Wiggim, 410 Salem Avenue, Dayton, Ohio; that said last Will and Testament was duly probated by the Probate Court of Montgomery County, Ohio; that on the 22nd day of May, 1933, Letters Testamentary were issued by said Probate Court of Montgomery County, Ohio, to Lyda B. Wiggim as Executrix of the estate of said Cora A. Wiggim; that said Cora A. Wiggim at the time of her death and prior thereto was the owner of twenty-one (21) shares of stock of the Chicago Joint Stock Land Bank and left as a part of her estate twenty-one (21) shares of stock; that under the laws of the United States referred to in said bill, said estate became liable to the plaintiffs and all other creditors of the Chicago Joint Stock Land Bank for all liability of said company which arose while said estate owned said stock up to an amount equal to the par value of said stock; that a Final Account was filed on the 20th day of February, 1935 by the said Lyda B. Wiggim as such Executrix; that the assets of said estate have been distributed to the beneficiaries thereof, although the claim of the plaintiffs and other creditors of the Chicago Joint Stock Land Bank against said estate arising out of the ownership by said estate of said shares of stock has never been paid; that said Lyda B. Wiggim was a beneficiary of said estate and as such beneficiary, was entitled to receive for her own use under said last Will and Testament, and did receive a large [fol. 17] part of the assets of said estate; that Florence Wiggim Crist was a beneficiary of said estate and as such beneficiary, was entitled to receive for her own use under said last Will and Testament, and did receive a large part of the assets of said estate; that Mariana Wiggim was a beneficiary of said estate and as such beneficiary, was entitled to receive for her own use under said last Will and Testament, and did receive a large part of the assets of said estate; that the value of such assets received by said ben-

eficiaries for their own use was in excess of the par value of said shares of stock owned by said estate; that under the laws of the United States said beneficiaries became and are liable to the plaintiffs and certain other creditors of the Chicago Joint Stock Land Bank for the payment of said claim of the plaintiffs and other creditors against said estate to the extent of the par value of said shares of stock.

That J. F. Dietrick who is named as a defendant in this cause died on the 8th day of October, 1932, a resident and inhabitant of Ohio; that J. F. Dietrick left a last Will and Testament appointing as Executrix of his estate, one Doris Langley Dietrick, Tippecanoe City, Ohio; that said last Will and Testament was duly probated by the Probate Court of Miami County, Ohio; that on the 5th day of November, 1932, Letters Testamentary were issued by said Probate Court of Miami County, Ohio, to Doris Langley Dietrick as Executrix of the estate of said J. F. Dietrick; that said J. F. Dietrick at the time of his death and prior thereto was the owner of twenty-five (25) shares of stock of the Chicago Joint Stock Land Bank and left as a part of his estate said twenty-five (25) shares of stock; that under the laws of the United States referred to in the said bill, said estate became liable to the plaintiffs and all other creditors of the Chicago Joint Stock Land Bank for all liability of said company which arose while said estate owned said stock up to an amount equal to the par value of said stock; that a Final Account was filed on the 30th day of April, 1935, by the said Doris Langley Dietrick as such Executrix; that the assets of said estate have been distributed to the beneficiary thereof, although the claim of the plaintiffs and other creditors of the Chicago Joint Stock Land Bank against said estate arising out of the ownership by said estate of said shares of stock has never been paid; that said Doris Langley Dietrick was a beneficiary of said estate and as such beneficiary, was entitled to receive for her own use under said last Will and Testament, and did receive the assets of said estate; that the value of such assets received by said beneficiary for her own use was [fol. 18] in excess of the par value of said shares of stock owned by said estate; that under the laws of the United States said beneficiary became and is liable to the plaintiffs and certain other creditors of the Chicago Joint Stock Land

Bank for the payment of said claim of the plaintiffs and other creditors against said estate to the extent of the par value of said shares of stock.

Plaintiffs allege that in the latter part of 1928 the defendants, Robert E. Cowden, Francis D. Schnacke, Frank W. Nicholas and A. M. Zimmerman, and other persons unknown to these plaintiffs, desired to purchase and hold certain shares of the stock of the Chicago Joint Stock Land Bank, but knowing that such shares were subject to assessment for the debts of the bank, desire to evade and escape the possibility of any such assessment. To that end, they conceived the idea of organizing an Ohio corporation, with a nominal capital, or with a capital precisely equal to any amounts which they might thereafter pay for shares of the Chicago Joint Stock Land Bank, and placing such shares of record in the name of such corporation, so that ostensibly any assessment levied on account of the ownership of such shares would be levied against such corporation. But it was part of the plan of said defendants to provide said corporation with no capital with which to meet any such possible assessment, and thereby said defendants sought to hold ownership of the shares of said Chicago Joint Stock Land Bank without being liable for any assessment upon such shares. Pursuant to this plan, said defendants, during the latter part of 1928, caused to be incorporated under the laws of Ohio a corporation known as the Western Securities Company (hereafter for brevity sometimes called Securities Company). Said Securities Company had an authorized capital of 250 shares without par value, and was authorized to commence business with a capital of $500.00 paid in. The defendants, Cowden, Schnacke, Nicholas and Zimmerman, were incorporators or officers of said Securities Company, and were stockholders therein. Subsequent to the organization of said Securities Company, and between January 11, 1929, and August 3, 1931, said defendants purchased 759 shares of the stock of the Chicago Joint Stock Land Bank, for the sum of approximately $8,000.00 and as such shares were purchased, said defendants caused said shares to be placed of record in the name of said Securities Company. Said shares of stock were purchased with money furnished by said defendants, and said purchases were made either [fol. 19] by said defendants, or by said Securities Company for the account and benefit of said defendants. Neither

said defendants nor the other stockholders of said Securities Company paid any money into the treasury of said Securities Company, except as money was required from time to time to purchase shares of the Chicago Joint Stock Land Bank. And no funds whatever were paid into the treasury of said Securities Company, except for the purpose of purchasing shares of said Chicago Joint Stock Land Bank. No fund whatever was provided by said defendants, or the other stockholders of said Western Securities Company wherewith to meet any possible assessment upon said shares, and, in point of fact, said Securities Company is wholly without funds wherewith to meet any such assessment. In point of fact, said Securities Company was organized and maintained solely as an agency of said individual defendants, for the purpose of holding of record the shares of the Chicago Joint Stock Land Bank which were purchased from time to time by said individual defendants. Subsequent to the insolvency of said Chicago Joint Stock Land Bank, said Western Securities Company carried on no further business. It failed to file the proper reports and pay the proper taxes from year to year to the Secretary of State of Ohio, with the result that on November 15, 1934, the articles of incorporation of said Securities Company were cancelled by the State of Ohio, and said Securities Company is no longer in existence. Plaintiffs are advised, and therefore allege, that by reason of the foregoing facts, the incorporators, officers, directors, and stockholders of said Western Securities Company should be regarded, in law, as the real owners of the 759 shares of stock which were placed of record in the name of Western Securities Company, and that such individuals should be subject to assessment accordingly. Plaintiffs are informed and believe that in addition to said Cowden, Schnacke, Nicholas, and Zimmerman, there were other stockholders of said Western Securities Company who were affiliated with said Cowden, Schnacke, Nicholas, and Zimmerman, and that all of the individuals thus affiliated conspired together to become the owners of shares of said Chicago Joint Stock Land Bank, and to evade and defeat any possible assessment which might be levied upon such shares. The defendants, Cowden, Schnacke, Nicholas, and Zimmerman are made parties hereto, to the end that they may be assessed on account of the shares owned of record by said Western Securities Company, and to the further

[fol. 20] end that they may be compelled to make discovery of the names and addresses of their associates, and of all other stockholders of said Western Securities Company.

Plaintiffs allege that the defendant, C. J. Mattern, is the duly appointed, qualified and acting Executor of the Estate of one R. Otto Baumann, deceased, under the authority of the Probate Court of Montgomery County, Ohio; that R. Otto Baumann was the owner of twenty-five (25) shares of Chicago Joint Stock Land Bank stock for a number of years prior to May 23, 1929, and that on said day said R. Otto Baumann caused said twenty-five (25) shares to be transferred to Herman D. Arnovitz, defendant herein. Plaintiffs further allege on information and belief that the estate of R. Otto Baumann was and is now the beneficial owner of said twenty-five (25) shares so transferred to defendant, Herman D. Arnovitz; that said transfer was made to contravene the statutory liability of ownership of said shares; that said Herman D. Arnovitz did not consent to the transfer of said shares to his name; that said Herman D. Arnovitz paid no consideration for said transfer of shares and has never accepted certificates therefor; that these plaintiffs are uninformed as to the real ownership of said twenty-five (25) shares and pray discovery in order to determine the real owner of the twenty-five (25) shares so transferred by R. Otto Baumann, deceased, to Herman D. Arnovitz, party defendant herein. Plaintiffs make C. J. Mattern as Executor of the Estate of R. Otto Baumann, a party defendant herein and pray that he be required to set up what interest said estate had in said twenty-five (25) shares of Chicago Joint Stock Land Bank.

Townley, Wild, Campbell & Clark, Legler & Murray,
Attorneys for Plaintiffs.

*Duly sworn to by Geo. R. Murray. Jurat omitted in printing.*

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[fol. 21] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 13, 1935

Now comes the defendant Andrew J. Christopher, and on the records, pleadings and files in this cause, moves the

Court to dismiss the Bill in Equity herein filed upon the following grounds, to-wit:

1. That it appears on the face of said Bill in Equity that this Court has no jurisdiction to herein determine this suit as against this defendant, and that this Court has no jurisdiction of the subject matter of this suit against this defendant.

2. That there is a mis-joinder of parties defendant in said Bill for the reason that the liability of the defendants herein, and each of them, is several and not joint.

3. That it appears on the face of said Bill that said Bill is wholly without equity.

4. That it appears on the face of said Bill, by plaintiffs own showing, that they are not entitled, nor is either of them entitled to the relief prayed for by this Bill against this defendant.

5. That it appears on the face of said Bill that the same is ambiguous therein in each of said respects, and in that it does not state the full Decree of the Court in the United [fol. 22] States District Court for the Northern District of Illinois, Eastern Division, upon which the Bill filed herein is predicated.

Wherefore, and for divers and other good reasons of objections appearing on the face of said Bill, this defendant prays judgment of this Honorable Court whether it shall be compelled to make further or any answer to said Bill, and it humbly prays to be hence dismissed with its costs in this behalf sustained.

Neal Hunter, A. P. Mercer, H. P. Williamson, Attorneys for Defendant, Andrew J. Christopher.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 13, 1935

Comes now the Third National Bank & Trust Co., Executor of the Estate of George W. Weimer, deceased, one of the defendants herein, and on the records, pleadings and files in said cause, and moves the Court to dismiss the Bill

in Equity of the plaintiffs upon the following grounds, to-wit:

1. That it appears on the face of said Bill of Equity that said Bill is wholly without equity.

2. That it appears on the face of said Bill that this Court has no jurisdiction in the subject matter of this suit, and no jurisdiction to herein determine the same.

3. That it appears on the face of said Bill that there is a mis-joinder of parties defendant herein, in that the liability of any of the defendants is not joint.

[fol. 23] 4. That it appears on the face of the Bill by plaintiffs own showing, that they are not entitled to nor either of them entitled to the relief prayed for by this Bill against the defendant, nor to any relief arising from facts alleged in said Bill.

5. That it appears on the face of said Bill that the same is ambiguous therein in each of said respects, and in that it does not state the full decree of the Court in the United States District Court for the Northern District of Illinois, Eastern Division, upon which the Bill filed herein is predicated.

Wherefore, and for divers and other good reasons of objection appearing on the face of said Bill, this defendant prays judgment of this Honorable Court whether it shall be compelled to make further or any answer to said Bill, and it humbly prays to be hence dismissed with its costs in this behalf sustained.

A. P. Mercer, H. P. Williamson, Attorneys for Defendant, The Third National Bank & Trust Co., Executor of the estate of George W. Weimer, Deceased.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed September 13, 1935

Now come the defendants, The Western Securities Company, Mrs. Emma Coats, Henry E. Myers L. Dale Dorney, Francis D. Schnacke and John Burlin Johnson, and re-

spectfully move the Court to dismiss the Bill of Complaint heretofore filed herein for the reasons that:

[fol. 24] First. Said Bill is insufficient in fact to constitute a valid cause of action in equity.

Second. Said Bill shows upon its face, and these defendants represent to the Court, that the person or persons entitled to collect the payment of the assessment heretofore made against the stockholders of the Chicago Joint Stock Land Bank of Chicago by the United States District Court for the Northern District of Illinois, Eastern Division, have an adequate and complete remedy at law therefor.

Said defendants further move the Court to dismiss as parties defendant to this Bill all those persons who are alleged to have held less than thirty-one shares of the stock of Chicago Joint Stock Land Bank, for the reason that this Court is without jurisdiction as to such defendants.

R. E. Cowden, Roy G. Fitzgerald, F. D. Schnacke,
Solicitors for said Defendants.

Receipt of copy of above motion acknowledged.

Legler & Murray, Solicitor for Plaintiffs.

September 13, 1935.

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IN UNITED STATES DISTRICT COURT

OBJECTION TO INTERROGATORIES AND MOTION TO DISMISS—
Filed September 13, 1935

Now come the defendants, Robert E. Cowden, Francis D. Schnacke, Frank W. Nicholas and A. M. Zimmerman, sued herein as incorporators, and/or officers of The Western Securities Company, a corporation, and object to the Inter-[fol. 25] rogatories filed herein and addressed to the defendants, Robert E. Cowden and Francis D. Schnacke, and move that said Interrogatories be dismissed for the reason that the same are impertinent, irrelevant and incompetent.

Said defendants further move that the Bill of Complaint herein be dismissed as to them for the reasons that they are improperly joined as defendants in this action, and that said Bill of Complaint is insufficient in fact to constitute a valid cause of action in equity against them.

R. E. Cowden, Roy G. Fitzgerald, F. D. Schnacke,
Solicitors for said Defendants.

Notice

Messrs. Legler & Murray, Dayton, Ohio, Attorneys for Plaintiffs:

Please take notice that the above named defendants, Robert E. Cowden, Francis D. Schnacke, Frank W. Nicholas and A. M. Zimmerman, propose to file forthwith and present to the above named Court as early as practicable the foregoing Objections to Interrogatories and Motion to Dismiss.

R. E. Cowden, Roy G. Fitzgerald, F. D. Schnacke, Solicitors for said Defendants.

Receipt of above notice, together with copy of said Objections to Interrogatories and Motion to Dismiss, is hereby acknowledged this 13th day of September, 1935.

Legler & Murray, Attorneys for Plaintiffs.

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[fol. 26] In United States District Court

Motion to Dismiss on Behalf of Defendant, Lyda B. Wiggim—Filed September 14, 1935

Now comes the Defendant, Lyda B. Wiggim, and moves the Court to dismiss the Bill of Complaint filed in the above entitled cause upon the ground and reason therefor, as follows:

1st. That there are not sufficient facts alleged to constitute a cause of action in equity against this Defendant.

2nd. That this Defendant is the owner of less than thirty-one (31) shares of stock of the Chicago Joint Stock Land Bank; and, therefore, the matter in controversy as between the Plaintiffs and this Defendant is less than Three Thousand Dollars ($3,000.00).

Murphy, Murphy & Mayl, Solicitors for the Defendant, Lyda B. Wiggim.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BY MARY E. CLUNET, ET AL.—Filed September 14, 1935

This day come Mary E. Clunet, Virginia Gohn, Mabel F. Beane, Carl W. Beane and Mabel F. Beane named as joint tenants, Charles A. Ford, Samantha B. Harter, and John Wehrly and Pearl H. Wehrly named as joint tenants, parties defendant, and severally move the Court to dismiss the Bill of Complaint as to them for the reasons following:

1. Plaintiffs have an adequate remedy at law.

2. The action (if any) against defendants and each of them should be at law.

[fol. 27] 3. The Bill is multifarious, joining many defendants and causes of action.

4. The Bill violates Equity Rule No. 26 in that it unites separate alleged causes of action for fixed amounts of money, against separate defendants, which are not properly cognizable in equity, and sufficient grounds do not appear for uniting them or resorting to equity.

5. The defendants are improperly joined.

6. The Bill is in derogation of rights guaranteed defendants by the Seventh Amendment of the Constitution of the United States, in that it would evade the requirement of filing suits against them at common law, for the money claimed, which suits are by said Amendment required to be by jury.

7. The Bill is in derogation of rights guaranteed by the Fifth Amendment of said Constitution in that it seeks to deprive defendants of trial by jury and deprive them of property without due process of law.

8. The Bill does not state a sufficient cause of action.

Roy G. Fitzgerald, Joseph W. Sharts, Attorneys for Defendants Named.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT BY DEFENDANT, THE CHARLES SUCHER PACKING COMPANY—Filed September 14, 1935

Now comes the defendant, The Chas. Sucher Packing Company, and moves the Court to dismiss Bill of Complaint for the following reasons:

1. No judgment or finding has been rendered in any proceeding to which this defendant was a party in reference [fol. 28] to the necessity for any assessment upon the stockholders of The Chicago Joint Stock Land Bank, 280 U. S. 49.

2. The purported judgment or finding in Illinois as to the necessity of assessing said stockholders did not have this defendant as a party thereto and further the time for appeal of said purported judgment or finding has not transpired.

3. The Bill of Complaint recites that the claim against this defendant is for assessment on 75 shares at $100.00 par value or a total of $7500.00 whereas the Acts of Congress limit the par value of said bank to $5.00 per share, or a total of $375.00 hence not within the jurisdiction of this Court.

4. For all such other errors as appear in said Bill of Complaint.

John W. Ratchford, Attorney for Defendant, The Chas. Sucher Packing Co.

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IN UNITED STATES DISTRICT COURT

MOTIONS OF J. D. ARTZ—Filed September 14, 1935

Now comes the Defendant, J. D. Artz and moves this Honorable Court as follows:

1. Appearing specially for the purpose of this Motion only, not entering his appearance generally and protesting the jurisdiction of this Honorable Court over the Defendant, moves to quash the service of the Subpœna in equity

upon this Defendant for the reason that this Court has no jurisdiction over his person.

[fol. 29] 2. Appearing specially for the purpose of this Motion only, not entering his appearance generally and protesting the jurisdiction of this Honorable Court over the Defendant, moves to dismiss the Bill of Complaint herein for the reason that upon the face of the said Bill this Court is without jurisdiction.

E. H. & W. B. Turner, Attorneys for the Defendant, J. D. Artz.

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IN UNITED STATES DISTRICT COURT

MOTIONS OF EDWARD T. TURNER AND WELLMORE B. TURNER, TRUSTEES—Filed September 14, 1935

Now come the Defendants, Edward T. Turner and Wellmore B. Turner as Trustees under the will of Earl H. Turner, deceased and move this Honorable Court as follows:

1. Appearing specially for the purpose of this Motion only, not entering their appearance generally and protesting the jurisdiction of this Honorable Court over the Defendants, move to quash the service of the Subpœna in equity upon these Defendants for the reason that this Court has no jurisdiction over their persons.

2. Appearing specially for the purpose of this Motion only, not entering their appearance generally and protesting the jurisdiction of this Honorable Court over the [fol. 30] Defendants, move to dismiss the Bill of Complaint herein for the reason that upon the face of the said Bill this Court is without jurisdiction.

E. H. & W. B. Turner, Attorneys for the Defendants, Edward T. Turner and Wellmore B. Turner, as Trustees under the Will of Earl H. Turner, Dec'd.

Motion to attach Exhibit "A" as a part of this Motion is sustained.

Nevin, Judge.

November 4, 1935.

[fol. 31] EXHIBIT "A" TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 12303

W. E. BRUSSELBACK, et al., Plaintiffs,

vs.

CHICAGO JOINT STOCK LAND BANK, a Corporation, et al., Defendants

DECREE

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. The Court has jurisdiction of the subject matter of this cause, and of the parties hereto.

2. The report of Master in Chancery Thomas J. Peden, heretofore filed in this cause, is hereby approved and confirmed in all respects, and all exceptions filed to said report by any of the parties to this suit are hereby overruled.

3. The findings of fact made by the Master in his said report are hereby adopted as the findings of fact required to be made by this Court, by the Federal Equity Rules.

4. The conclusions of law made by the Master in his said report are hereby adopted as the conclusions of law required to be made by this Court, by the Federal Equity Rules.

5. It is further ordered, adjudged and decreed That an [fol. 32] assessment be and hereby is levied upon all of the stockholders of the Chicago Joint Stock Land Bank, and each and every one of them, equally and ratably, and not one for another, in the amount of one hundred per cent (100%) of the par value of the stock so held by each stockholder on the first day of October, 1932.

6. It is further ordered, adjudged and decreed That plaintiffs have and recover judgment pro confesso, payable to John B. Gallagher, Receiver herein, against each of the following defendants, who have been served with process herein, and who have failed to appear, or to file answer herein, in the amounts set opposite their respective names, as follows:

| Name | Amount |
|---|---|
| W. E. Ainsworth | Two Thousand Dollars ($2,000) |
| George N. Alderson | Four Thousand Dollars ($4,000) |
| William O. Anderson | Four Hundred Dollars ($400) |
| Mrs. Emma Andrews | One Thousand Dollars ($1,000) |
| Edwin H. Baker | Five Hundred Dollars ($500) |
| Anna K. Baldwin | Fifty-one Hundred Dollars ($5100) |
| J. F. Ballou | Six Hundred Dollars ($600) |
| Frank H. Bartholomay | Five Thousand Dollars ($5,000) |
| Ole Benson | Twenty-one Hundred Dollars ($2100) |
| George Bleakley | Four Thousand Dollars ($4,000) |
| Mrs. Mary E. Bowman | Five Hundred Dollars ($500) |
| Jacob Buss | Ninety-eight Thousand Five Hundred Dollars ($98,500) |
| Reid H. Carson | Six Hundred Dollars ($600) |
| Christian Church | Nine Hundred Dollars ($900) |
| Flora B. Clark | Eighteen Hundred Dollars ($1800) |
| Mrs. Ellen Comerford | Seven Hundred Dollars ($700) |
| Miss Margaret Comerford | Seven Hundred Dollars ($700) |
| R. C. Cook | Fifty-five Hundred Dollars ($5500) |
| Dean C. Cutler | Eleven Hundred Dollars ($1100) |
| R. L. Cutler | Five Hundred Dollars ($500) |
| J. H. Dempsey | One Hundred Dollars ($100) |
| Clarissa E. Ela | One Thousand Dollars ($1,000) |
| Gustave L. Ensenberger | Five Hundred Dollars ($500) |
| Thomas R. Evans | Two Hundred Thirty-five Thousand Dollars ($235,000) |

[fol. 33]

| | |
|---|---|
| Evanston Investors, Inc. | Twenty-eight Thousand Three Hundred Dollars ($28,300) |
| Victor L. Ferrette | One Thousand Dollars ($1,000) |
| T. T. Fletcher | Thirteen Thousand, Two Hundred Dollars ($13,200) |
| Lillie G. Gage | Five Hundred Dollars ($500) |
| Ada Goble | One Hundred Dollars ($100) |
| Harriet E. Grandy | Three Thousand Dollars ($3,000) |
| William Grennan | Five Thousand, Four Hundred Dollars ($4,500) |
| Mabel L. Griswold | Four Thousand, Four Hundred Dollars ($4,400) |
| Spencer C. Grover | Five Hundred Dollars ($500) |
| William Hartquist | Twelve Hundred Dollars ($1200) |
| Mrs. Agnes Harty | One Thousand Dollars ($1,000) |
| Alfred M. Hayden | Five Hundred Dollars ($500) |
| Robert J. Herrmann | Fourteen Hundred Dollars ($1400) |
| Angie R. Hickman | Eight Hundred Dollars ($800) |
| Mrs. Cleta M. Hurst | Five Hundred Dollars ($500) |
| Elizabeth T. Hurst | Two Hundred Dollars ($200) |
| Mary L. Ivers | Five Hundred Dollars ($500) |
| Charles J. Johnson | Seven Hundred Dollars ($700) |

| Name | Amount |
|---|---|
| Mrs. Emma Oleson Johnson | Five Hundred Dollars ($500) |
| Manuel Johnson | Six Hundred Dollars ($600) |
| Theodore C. Johnson | Two Thousand Dollars ($2,000) |
| Mrs. Nettie Kelly | Seven Hundred Dollars ($700) |
| E. F. Kirby | Two Thousand Dollars ($2,000) |
| Robert J. Koeppe | Eighteen Thousand Dollars ($18,000) |
| Henry Victor E. Larson | Four Hundred Dollars ($400) |
| La Salle National Bank & Trust Company, as Trustee for Norma M. Burkart, under agreement dated January 9, 1931 | Two Thousand Five Hundred Dollars ($2,500) |
| La Salle National Bank & Trust Company, as Trustee for William S. Hawthorne, under agreement dated December 30, 1930 | Twenty-eight Thousand Dollars ($28,000) |
| La Salle National Bank & Trust Company, Trustee for Anne Hummer, under agreement dated April 25, 1931 | Two Thousand Dollars ($2,000) |
| La Salle National Bank & Trust Company, Trustee for Marie Jakowsky under agreement dated January 14, 1931 | Five Thousand, Seven Hundred Dollars ($5,700) |

[fol. 34]

| | |
|---|---|
| La Salle National Bank & Trust Company, Trustee for Helen Wacker under agreement dated June 11, 1932 | Seven Thousand Dollars ($7,000) |
| La Salle National Bank & Trust Company, Trustee for Irma Wirtz under agreement dated January 31, 1931 | One Thousand Dollars ($1,000) |
| Mrs. Kate Lewis | Five Hundred Dollars ($500) |
| A. W. Lillienstein | One Thousand Dollars ($1,000) |
| Elmer I. Lutz | One Thousand, Five Hundred Dollars ($1,500) |
| Mrs. Mantie H. Mathers | One Thousand Dollars ($1,000) |
| M. Belle Mathews | Three Thousand Six Hundred Dollars ($3,600) |
| William B. Mattingly | One Thousand, Six Hundred Dollars ($1,600) |
| Andrew R. Michael | Five Hundred Dollars ($500) |
| Ed. F. Miller | One Thousand Dollars ($1,000) |
| Louisa Miller | Seven Hundred Dollars ($700) |
| Charles L. Mombleau | Five Thousand Dollars ($5,000) |
| Miss Olive Myers (now Mrs. Olive Cedars) | Two Thousand, One Hundred Dollars ($2,100) |

| Name | Amount |
|---|---|
| Mrs. Sarah Myers | One Thousand, Five Hundred Dollars ($1,500) |
| Elmer Nafziger | Two Hundred Dollars ($200) |
| William O'Connell | Eleven Thousand, Five Hundred Dollars ($11,500) |
| Miss Hattie Patterson | Eight Thousand, Six Hundred Dollars ($8,600) |
| Charles K. Peck and Hattie Patterson, as executors of the estate of Susan M. Bailey | Four Hundred Dollars ($400) |
| Mrs. Ella Perrine | Five Thousand, Seven Hundred Dollars ($5,700) |
| H. Albert Pratt | Seven Hundred Dollars ($700) |
| William G. Ready | Seven Thousand Dollars ($7,000) |
| John E. Reynolds | Eight Hundred Dollars ($800) |
| Charles Roberts | Three Hundred Dollars ($300) |
| John M. Rosenfield | Ten Thousand Dollars ($10,000) |
| Allan A. Rowand | One Thousand, Six Hundred Dollars ($1,600) |
| Elizabeth O. Rowe | Four Hundred Dollars ($400) |
| Fredericka Schmith | Two Hundred Dollars ($200) |
| Elmer Schultz | Twenty-three Thousand, Two Hundred Dollars ($23,200) |

[fol. 35]

| | |
|---|---|
| Odelia Schulz | Two Hundred Dollars ($200) |
| Martin Schwanberger | Fifteen Thousand Dollars ($15,000) |
| Mae M. Sexauer | Eight Hundred Dollars ($800) |
| Dora M. Sheaff | Two Thousand Dollars ($2,000) |
| Cecil Shillum | Five Thousand, Three Hundred Dollars ($5,300) |
| Amelia Smith | One Hundred Dollars ($100) |
| Fred W. Smith | One Hundred Dollars ($100) |
| Fred W. Smith and John C. Smith, executors of the estate of Anna M. Wise, deceased | Two Hundred Dollars ($200) |
| Miss Hertha Smith | Five Hundred Dollars ($500) |
| Manfred Smith | Eleven Hundred Dollars ($1100) |
| Mrs. Eileen Soland | Nine Hundred Dollars ($900) |
| Melville G. Soule | Four Thousand, Seven Hundred Fifty Dollars ($4,750) |
| Mrs. Lois O. Squires | Two Thousand, Five Hundred Dollars ($2,500) |
| Fred R. Stephenson | Two Thousand, Eight Hundred Dollars ($2,800) |
| A. D. Stevens | Five Hundred Dollars ($500) |
| Miss Mildred A. Stolldorf | Three Hundred Dollars ($300) |
| Miss Charlotte Jane Taylor | One Thousand Dollars ($1,000) |
| Glen C. Tellkamp | Eight Hundred Dollars ($800) |
| Edward C. Tepper | Five Thousand Dollars ($5,000) |
| Bernice L. Thurow | Eight Hundred Dollars ($800) |

| Name | Amount |
|---|---|
| Harold J. Voorhees | One Thousand, Five Hundred Dollars ($1,500) |
| Joe Voorhees | Nine Hundred Dollars ($900) |
| Mrs. Ruby B. Voorhees | One Thousand, Five Hundred Dollars ($1,500) |
| Edward S. Wagner | One Thousand, Two Hundred Dollars ($1,200) |
| Charles O. Wamhoff | Three Thousand, Two Hundred Dollars ($3,200) |
| Harry Wilder Wesson | Eight Hundred Dollars ($800) |
| Frank White | Thirty-six Thousand Dollars ($36,000) |
| Minnie M. Willard | Four Hundred Dollars ($400) |
| Harold J. Winans | Five Thousand Dollars ($5,000) |
| Ed Wise | One Hundred Dollars ($100) |
| Elmer Wise | One Hundred Dollars ($100) |
| Frank Wise | One Hundred Dollars ($100) |
| George Wise | One Hundred Dollars ($100) |
| Charles G. Wolaver | Three Hundred Dollars ($300) |

7. It is further ordered, adjudged and decreed That plain-
[fol. 36] tiffs have and recover judgment, payable to John B. Gallagher, Receiver herein, against each of the following defendants, who have appeared and answered herein, in the amounts set opposite their respective names, as follows:

| Name | Amount |
|---|---|
| Ima Hall Adee | Three Thousand, Five Hundred Dollars ($3,500) |
| F. W. Alderman | Eight Hundred Dollars ($800) |
| Ruby Alderman | One Hundred Dollars ($100) |
| Walter S. Allen | Four Hundred Dollars ($400) |
| Mrs. Clara V. Ashling | Three Hundred Dollars ($300) |
| E. Adelbert Ashling | Five Hundred Dollars ($500) |
| Elwin Adelbert Ashling | One Hundred Dollars ($100) |
| John M. Avise | Six Hundred Dollars ($600) |
| Mrs. Ada M. Bacone | Four Hundred Dollars ($400) |
| Bacone & Co. | Seven Hundred Dollars ($700) |
| W. I. Baird | One Thousand Dollars ($1,000) |
| Emily Baker | One Hundred Dollars ($100) |
| Lyman Baker | One Hundred Dollars ($100) |
| Mary Cossit Baker | One Hundred Dollars ($100) |
| Mrs. Mary Lyman Baker | Two Thousand, Six Hundred Dollars ($2,600) |
| John L. Barthelemy | Five Hundred Dollars ($500) |
| Walter Bartlett | Eight Hundred Dollars ($800) |
| Mrs. Eda R. Becker | One Thousand Dollars ($1,000) |
| Fred E. Becker | One Thousand Dollars ($1,000) |
| Samuel F. Beetz | Six Hundred Dollars ($600) |
| Henry D. Bills | One Thousand Dollars ($1,000) |

| Name | Amount |
|---|---|
| Arthur H. Black | Five Hundred Dollars ($500) |
| Hal Bollman | Two Thousand Dollars ($2,000) |
| C. A. Bopes | Three Thousand, Three Hundred Dollars ($3,300) |
| Delaie D. Bouslough | One Thousand Dollars ($1,000) |
| A. L. Bowen | Three Thousand Dollars ($3,000) |
| R. Y. Bradshaw | Two Thousand Dollars ($2,000) |
| Luther B. Bratton | One Thousand Four Hundred Dollars ($1,400) |
| Mrs. Ruby S. Brewer | Five Hundred Dollars ($500) |
| Ruth O. Brewer | Four Hundred Dollars ($400) |
| Cora L. Briggs | One Thousand Dollars ($1,000) |
| F. E. Brown | Two Thousand Dollars ($2,000) |
| Roy W. Brown | One Thousand, Five Hundred Dollars ($1,500) |
| W. J. Burleigh | Four Thousand Dollars ($4,000) |
| W. N. Byler | Five Hundred Dollars ($500) |
| Eliza Esther Carr | Six Hundred Dollars ($600) |
| [fol. 37] | |
| Edward B. Chapin | Five Thousand, Five Hundred Dollars ($5,500) |
| Miss Lucy Chapin | Five Hundred Dollars ($500) |
| John Charlton | Three Thousand Dollars ($3,000) |
| Richard E. Claypool | One Thousand Dollars ($1,000) |
| Ethel C. Cleary | One Thousand Dollars ($1,000) |
| E. A. Clevidance | One Thousand Dollars ($1,000) |
| Mrs. Hazel Noble Clevidance | Five Hundred Dollars ($500) |
| Kent S. Clow, guardian of Elise Hamill Clow | One Thousand Dollars ($1,000) |
| Commercial Merchants National Bank and Trust Company, of Peoria, as trustee of the Estate of S. L. Nelson, deceased | Five Thousand Dollars ($5,000) |
| John D. Constant | One Thousand, One Hundred Dollars ($1,100) |
| Hazel Roper Corsa | One Thousand Dollars ($1,000) |
| C. A. Crosby | One Thousand Dollars ($1,000) |
| George M. Cummings | Seven Hundred Dollars ($700) |
| Ada E. Davis and Cora B. Hill, jointly | Eight Hundred Dollars ($800) |
| Ellen Davis | One Thousand, Five Hundred Dollars ($1,500) |
| Mrs. Olive C. Dean | One Thousand Dollars ($1,000) |
| Wilford W. DeBerard | One Thousand Dollars ($1,000) |
| C. Leslie Derr | Five Hundred Dollars ($500) |
| Mrs. A. W. Deselm | Five Hundred Dollars ($500) |
| Mrs. Mary E. Dilley | One Hundred Dollars ($100) |
| Myrtle T. Dixon | One Thousand, One Hundred Dollars ($1,100) |
| Mrs. Helen M. Dougherty | One Thousand, Eight Hundred Dollars ($1,800) |

| Name | Amount |
|---|---|
| Hermea Droysen | Three Thousand, Five Hundred Dollars ($3,500) |
| Miss Elizabeth Dunbar | Five Hundred Dollars ($500) |
| C. Elton Eckerd | One Thousand Dollars ($1,000) |
| Lelah Shearer Eddy | Five Hundred Dollars ($500) |
| George Ehrlicher | One Thousand Dollars ($1,000) |
| Clara E. Elder | Five Hundred Dollars ($500) |
| Alice Babb Ewing | Seven Hundred Dollars ($700) |
| Howard Eychaner | Two Thousand Dollars ($2,000) |
| James Gordon Fairbanks | Four Hundred Dollars ($400) |
| Jean Secor Fairbanks | Four Hundred Dollars ($400) |
| Kellogg Fairbank | Ten Thousand Dollars ($10,000) |
| Kellogg Fairbank and Benjamin Carpenter, as Trustees under the Will of N. K. Fairbank | Twenty-five Thousand Dollars ($25,000) |

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| | |
|---|---|
| Mrs. Mary R. Fey | Five Hundred Dollars ($500) |
| W. J. Forth | Four Hundred Dollars ($400) |
| Arthur J. Fritz | Twelve Hundred Dollars ($1200) |
| P. H. Gardner | Seven Thousand Dollars ($7000) |
| Oliver L. Gehant | Five Hundred Dollars ($500) |
| William George | Four Thousand, Three Hundred Dollars ($4,300) |
| Mrs. Mary H. Gibson | Three Hundred Dollars ($300) |
| The Glessner Company | Seventeen Thousand, Five Hundred Dollars ($17,500) |
| Fred G. Gordon | Five Hundred Dollars ($500) |
| Chester Graehling | Three Thousand Dollars ($3,000) |
| John A. Greenlee | Two Thousand Dollars ($2,000) |
| Thomas M. Greenlee | One Thousand Dollars ($1,000) |
| Edna L. Grummon | One Thousand, Five Hundred Dollars ($1,500) |
| Emma L. Grummon and Edna L. Grummon, jointly | One Thousand, Six Hundred Dollars ($1,600) |
| E. Bentley Hamilton | Two Thousand Dollars ($2,000) |
| Miss Fredericka A. Harbaugh | One Thousand Dollars ($1,000) |
| Harris Trust and Savings Bank, as executor of the Estate of Robert B. Andrews, deceased | Two Thousand Dollars ($2,000) |
| Miss Elizabeth B. Harvey | Two Hundred Dollars ($200) |
| E. Charles Harvey | Three Hundred Dollars ($300) |
| Hattie M. Hatheway | Two Thousand, Five Hundred Dollars ($2,500) |
| Harriet Hayward | Nine Thousand Dollars ($9,000) |
| Helen Oakes Head | Three Thousand Dollars ($3,000) |
| Ruth Heckman | Eight Hundred Dollars ($800) |
| Louis M. Hemrick | One Thousand Dollars ($1,000) |
| William R. Hemrick | One Thousand, Two Hundred Dollars ($1,200) |

| Name | Amount |
|---|---|
| Mrs. Janet Herbison | Five Hundred Dollars ($500) |
| Irwin W. Herrmann | One Thousand Dollars ($1,000) |
| Dr. E. E. Hill | One Thousand Dollars ($1,000) |
| Florence Noble Hopkins | Five Hundred Dollars ($500) |
| Clement W. Hulit | Seven Hundred Dollars ($700) |
| Jessie Mable Hummel | Four Hundred Dollars ($400) |
| Carlton C. Hunt | One Thousand, Five Hundred Dollars ($1,500) |
| George S. Hyde | Eight Hundred Dollars ($800) |
| Charles H. Ireland | Four Hundred Dollars ($400) |
| Fred Jackson | Two Thousand Dollars ($2,000) |
| Charles P. Jacobson | One Thousand Dollars ($1,000) |
| Jensen and Nelson | Eight Hundred Dollars ($800) |

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| | |
|---|---|
| Mary Ada Johnson | One Thousand Dollars ($1,000) |
| Louise H. Keator | One Thousand Dollars ($1,000) |
| Miss Katherine Keenan | Six Hundred Dollars ($600) |
| Mary A. Keenan | Six Hundred Dollars ($600) |
| William T. Keenan | Six Hundred Dollars ($600) |
| Emily F. Kempshall | Five Thousand Dollars ($5,000) |
| John C. Klein | One Thousand, Five Hundred Dollars ($1,500) |
| William F. Klein | One Thousand, Five Hundred Dollars ($1,500) |
| Burdette R. Knappenberger | Three Thousand, Three Hundred Dollars ($3,300) |
| Frank N. Kreissl | Ten Thousand Dollars ($10,000) |
| Abraham L. Lanning | One Thousand, Five Hundred Dollars ($1,500) |
| LaSalle National Bank & Trust Company, Trustee for George Bennett, Margaret Thompson, Isabelle Anderson, D. H. Bennett, and Agnes Bennett, under Agreement dated November 19, 1931 | One Thousand, Five Hundred Dollars ($1,500) |
| Mrs. Frances G. Lee | Five Thousand Dollars ($5,000) |
| John D. Lent | One Thousand Dollars ($1,000) |
| Morris Lewis | One Thousand, Five Hundred Dollars ($1,500) |
| Mrs. Helen Lindau | One Thousand Dollars ($1,000) |
| Elmer R. Lionberger | Two Thousand, Five Hundred Dollars ($2,500) |
| Walter I. Lionberger | One Thousand Dollars ($1,000) |
| Charles G. Little | Eight Thousand Dollars ($8,000) |
| John S. Little | Thirteen Thousand Dollars ($13,000) |
| Mrs. Kate Wells Lockwood | Four Thousand Dollars ($4,000) |
| Conrad H. Loebach | Three Hundred Dollars ($300) |

| Name | Amount |
|---|---|
| Mrs. Eva M. Longcor | One Thousand, Five Hundred Dollars ($1,500) |
| Arthur T. Loomis | Two Hundred Dollars ($200) |
| Elizabeth R. Loomis | Three Thousand, Nine Hundred Dollars ($3,900) |
| L. M. Loomis | Two Thousand, Six Hundred Dollars ($2,600) |
| Miss Margaret Loring | One Thousand, Four Hundred Dollars ($1,400) |
| Jesse Lowenhaupt | One Thousand Dollars ($1,000) |
| Frank Maas | Five Hundred Dollars ($500) |
| Thomas Mangion | One Thousand Dollars ($1,000) |
| [fol. 40] | |
| Harrison Mathewson | One Thousand, Four Hundred Dollars ($1,400) |
| John W. Mathewson | Eight Hundred Dollars ($800) |
| Milford McCammond | Seven Hundred Dollars ($700) |
| John M. McGowan | Four Hundred Dollars ($400) |
| C. H. McKenney | One Thousand Dollars ($1,000) |
| Mrs. Jennie S. Means | Five Thousand Dollars ($5,000) |
| Mrs. S. R. Meck | One Thousand Dollars ($1,000) |
| Arthur Meeker | Fifteen Hundred Dollars ($1500) |
| Gertrude M. Meredith | Eight Hundred Dollars ($800) |
| Kate S. Meserve | Ten Thousand Dollars ($10,000) |
| Frank W. Meyer | One Thousand Dollars ($1,000) |
| Miss Mary B. Meyers | One Hundred Dollars ($100) |
| Henry Clay Miller | Two Thousand Dollars ($2,000) |
| Lucille Carr Miller | Two Thousand Dollars ($2,000) |
| Charles L. Morris | Five Hundred Dollars ($500) |
| George Murray | Two Thousand Dollars ($2,000) |
| George P. Nauman | Eight Hundred Dollars ($800) |
| Robert H. Nauman | Eight Hundred Dollars ($800) |
| Charles G. Nelson | One Thousand, One Hundred Dollars ($1,100) |
| Henry T. Noble | One Thousand, Five Hundred Dollars ($1,500) |
| George North | One Thousand, Two Hundred Dollars ($1,200) |
| Catherine O'Brien | One Thousand Dollars ($1,000) |
| Fred L. Ochsner | One Thousand Dollars ($1,000) |
| Katherine Ochsner, as guardian of Carroll A. Ochsner | Six Hundred Dollars ($600) |
| Katherine Ochsner, as guardian of Cecil S. Ochsner | Five Hundred Dollars ($500) |
| Charles Ohaven | Five Hundred Dollars ($500) |
| Sadie C. Parker | One Thousand Dollars ($1,000) |
| Mrs. Ivah W. Pearson | One Hundred Four Thousand, Dollars ($104,000) |
| C. E. Peck | One Thousand, Five Hundred Dollars ($1,500) |
| Perry J. Peters | Nine Hundred Dollars ($900) |

| Name | Amount |
|---|---|
| Mrs. Lela Lowe Pierson | Four Hundred Dollars ($400) |
| Buenaventura H. Portuondo | Two Hundred Dollars ($200) |
| Dean Reeves | Five Hundred Dollars ($500) |
| Mrs. Edith M. Reynolds | Three Hundred Dollars ($300) |
| Mrs. Elba K. Reynolds | One Thousand, One Hundred Dollars ($1,100) |
| James B. Reynolds | One Thousand Dollars ($1,000) |
| Herbert H. Riddle | Three Thousand, Five Hundred Dollars ($3,500) |
| Miss Mary A. Riddle (now Mrs. Alexander Greene) | Two Thousand, Five Hundred Dollars ($2,500) |

[fol. 41]

| | |
|---|---|
| Louis C. Rinker | One Thousand, Six Hundred Dollars ($1,600) |
| Mae S. Rosbrook | One Thousand Dollars ($1,000) |
| Miss Emilie Rose | One Thousand, One Hundred Dollars ($1,100) |
| Mildred Morgan Roth | Three Thousand Dollars ($3,000) |
| Miss Helen R. Ryan | One Thousand Dollars ($1,000) |
| Charles F. Sager | Five Thousand Dollars ($5,000) |
| Charles E. Sager, Administrator of the Estate of Thomas G. Sager | One Thousand, Three Hundred Dollars ($1,300) |
| Miss Mabel A. Sawyer | One Thousand Dollars ($1,000) |
| Charles Scheidecker | Four Thousand Dollars ($4,000) |
| Edward L. Scheidenhelm | Five Thousand Dollars ($5,000) |
| W. T. Schell | Seven Hundred Dollars ($700) |
| Mrs. Corinne H. Schiller | One Thousand Dollars ($1,000) |
| Philip J. Schmidt | Eight Hundred Dollars ($800) |
| Daisy Schoeppel | Seven Hundred Dollars ($700) |
| Rosetta Schwerer | Four Hundred Dollars ($400) |
| W. T. Scudder | Two Thousand Dollars ($2,000) |
| L. T. Seales | One Thousand, Seven Hundred Dollars ($1,700) |
| Otto Sendlinger | Five Hundred Dollars ($500) |
| G. W. Shanks | Four Thousand, Five Hundred Dollars ($4,500) |
| Gertrude L. Curtis Shattuck | Three Hundred Dollars ($300) |
| W. R. Shumaker | Five Thousand, Two Hundred Dollars ($5,200) |
| Mrs. Grace Meyers Silverman | Two Hundred Dollars ($200) |
| Frank Simek | Two Thousand, Five Hundred lars ($2,500) |
| Horace F. Simmons | One Thousand, Seven Hundred Dollars ($1,700) |
| Harry A. Slaybaugh | Two Hundred Dollars ($200) |
| Clyde Smith | Three Thousand, Five Hundred Dollars ($3,500) |
| Mrs. Nellie J. Smith | Five Hundred Dollars ($500) |
| George L. Snively | One Thousand Dollars ($1,000) |

| Name | Amount |
|---|---|
| Mrs. Mary Williams Sparrow | Three Thousand, Six Hundred Dollars ($3,600) |
| Frank E. Spink and Carrie Spink, jointly | Nine Hundred Dollars ($900) |
| Mrs. Olive B. Stickle | One Thousand Dollars ($1,000) |
| Alexander J. Strom | Two Hundred Dollars ($200) |
| Frank H. Sutton | Four Hundred Dollars ($400) |
| Maria West Sutton | Six Hundred Dollars ($600) |
| James E. Thiell | Five Hundred Dollars ($500) |
| Frederick B. Townsend | Three Thousand, Four Hundred Dollars ($3,400) |

[fol. 42]

| | |
|---|---|
| Ernest Tripp | One Thousand Dollars ($1,000) |
| Laura B. Tyler | Five Hundred Dollars ($500) |
| William B. Tyler | Three Thousand Dollars ($3,000) |
| Harry Typer | Two Thousand, Five Hundred Dollars ($2,500) |
| James A. Walker | One Thousand Dollars ($1,000) |
| James Wallace | Two Thousand Dollars ($2,000) |
| M. Ruth Wallace | One Thousand, Seven Hundred Dollars ($1,700) |
| Arthur Walter | One Thousand Dollars ($1,000) |
| Ferd Eliel Wertheim | Three Hundred Dollars ($300) |
| E. C. Wetzel | Eight Hundred Dollars ($800) |
| Thomas Wickens | Two Thousand Dollars ($2,000) |
| Edward A. Wilcox | Three Thousand, One Hundred Dollars ($3,100) |
| Howard L. Willette | Two Thousand Dollars ($2,000) |
| Robert L. Williams | Six Hundred Dollars ($600) |
| M. J. Wormley | Two Thousand Dollars ($2,000) |
| Alex Wylie | One Thousand, Two Hundred Dollars ($1,200) |
| Charles A. Zeigler | Seven Hundred Dollars ($700) |

8. It is further ordered, adjudged and decreed That unless the above named defendants pay the amounts of their respective assessments, as above set forth, within forty-five (45) days from this date, then at the request of plaintiffs or their counsel, an execution shall issue for the enforcement of the payment thereof, as in cases at law.

9. It is further ordered adjudged and decreed That the Receiver herein shall cause notice to be published once each week for four successive weeks in the Chicago Daily Law Bulletin, a secular newspaper of general circulation in the State of Illinois, to the effect that all persons having claims as creditors of the Chicago Joint Stock Land Bank shall be permitted to file their intervening petitions in this proceeding within a period of three months from the date of the

first publication of such notice; and all such claimants shall have such period within which to intervene herein, and to make proof of their claims before the Receiver herein, failing to do which, such creditors shall have no claim against the fund collected herein.

[fol. 43] 10. It is further ordered, adjudged and decreed That the Receiver herein be and he is hereby authorized to collect from any or all of the stockholders of said Bank the assessments hereby levied against such stockholders, whether such stockholders be parties to this suit or not, and whether such stockholders be residents of Illinois, or reside elsewhere. And upon payment in full of any such assessments to the Receiver herein, such Receiver is hereby authorized to give full discharge and acquittance to any stockholder thus making payment.

11. It is further ordered, adjudged and decreed That the Court reserves jurisdiction herein against stockholders, or against persons liable as stockholders, who are not parties hereto, or who have not been served with process herein, and upon discovery by plaintiffs or their counsel of any such stockholders, or persons liable as such, plaintiffs may, at any time, apply to this Court for further relief in respect thereto.

12. It is further ordered, adjudged and decreed That the Court reserves jurisdiction as to all questions which may arise concerning the validity of claims filed herein by intervenors, concerning the application and distribution of moneys collected by the receiver herein, and concerning the settlement of the account of the Receiver, his discharge, and the amount to be allowed the Receiver and counsel for plaintiffs, and also concerning the compromise by the Receiver herein of doubtful claims, or of claims against stockholders who are of doubtful solvency.

13. It is further ordered, adjudged and decreed That the court costs herein, including the fee of the Master, be paid by the Receiver herein out of the funds collected from the stockholders; and upon supplemental petition and order, said Receiver, from such fund, is authorized to reimburse himself and the plaintiffs herein, and their counsel, for all disbursements made by them, or any of them, on account of

[fol. 44] costs and expenses incurred in connection with the prosecution of this litigation.

Enter, this 5th day of August, A. D. 1935.

Barnes, Judge of the District Court of the United States, For the Northern District of Illinois, Eastern Division.

[fols. 45-46] UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Henry W. Freeman, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Order entered August 5th, A. D. 1935, in the matter of W. E. Brusselback, et al., complainants, vs. Chicago Joint Stock Land Bank, a corporation, et al., defendants, In Equity No. 12303, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this — day of ——, A. D. 1935.

—— ——, Clerk.

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[fol. 47] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed September 14, 1935

Now come the defendants, Jacob A. Oneth, James M. Irvin as Administrator of the estate of Obed W. Irvin, deceased, Miriam Mathiot Brown, Katherine G. Mathiot, L. Dale Dorney and Emma M. Wiedenbein and move the court to dismiss the Bill of Complaint herein for the following reasons:

1. The Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity.

2. There is misjoinder of defendants and causes of action not affecting all parties.

3. As to the defendants, Jacob A. Oneth, James M. Irvin as Administrator of the estate of Obed W. Irvin, deceased, Miriam Mathiot Brown, Katherine G. Mathiot and L. Dale Dorney it is apparent on the face of the Bill that this court

has no jurisdiction of the subject matter of the action, as the matter in controversy with respect to each of said defendants does not exceed Three Thousand ($3,000.00) Dollars exclusive of interest and costs.

R. K. Landis, Irvin G. Bieser, Solicitors for said Defendants, Jacob A. Oneth, James M. Irvin, as Administrator of the estate of Obed W. Irvin, deceased, Miriam Mathiot Brown, Katherine G. Mathiot, L. Dale Dorney and Emma M. Wiedenbein. McMahon, Corwin, Landis & Markham, 11 West Monument Avenue, Dayton, Ohio.

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[fol. 48] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed September 14, 1935

Now comes the Defendant, Gladys L. Smith, and respectively moves the Court to dismiss the Bill of Complaint against her heretofore filed herein for the reasons that:

First. Said Bill is insufficient in fact to constitute a valid cause of action in equity.

Second. Said Bill shows upon its face that said Defendant, Gladys L. Smith, owns only ten (10) shares of stock of said the Chicago Joint Stock Land Bank of Chicago. Said Defendant, therefore, moves the Court to dismiss her as Party Defendant to this Bill, because she owns less than thirty-one (31) shares of said stock, this Court not having jurisdiction as to her.

Pickrel, Schaeffer, Harshman & Young, Solicitors for said Defendants.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed September 16, 1935

Now comes the Defendant, Zola B. Horrell, and respectfully moves the Court to dismiss the Bill of Complaint heretofore filed herein for the reason that:

First. Said Bill is insufficient in fact to constitute a valid cause of action in equity.

Pickrel, Schaeffer, Harshman & Young, Solicitors for the Defendant.

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[fol. 49] In United States District Court

Motion to Dismiss—Filed September 17, 1935

Sirs:

Please Take Notice that the undersigned will move this Court for an order to dismiss the action against Alice Jane Russam on the 7th day of October, 1935, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the Post Office Building in Dayton, Ohio.

Yours etc., Wysong, Patricoff & Lautenburg, Solicitors for Defendant.

To Legler & Murray, Plaintiff's Solicitors, Frank H. Rickett, Clerk of the Court.

Copy received: Legler & Murray, Sept. 17, 1935.

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In United States District Court

Motion of John D. Wachman, Defendant, to Dismiss—Filed September 17, 1935

Now comes the defendant, John D. Wachman, by his counsel, and moves the Court to dismiss this defendant from this cause, on the following grounds:

I. There is a mis-joinder of parties defendant.

II. The court in which this suit is brought has not jurisdiction over the defendant.

III. The defendant is a resident of and was served in the City of Cincinnati, Hamilton County, Ohio, and suit, if [fol. 50] any lies, should have been filed in the United States District Court for the Southern District of Ohio, Western Division, at Cincinnati, Ohio, instead of at Dayton, Ohio.

IV. Suit against this defendant, if any lies, is not properly cognizable in equity, but only at law.

V. Petition does not state facts sufficient to constitute a cause of action against this defendant.

Paxton & Seasongood, Attorneys for Defendant, John D. Wachman.

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IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT LULU NIXON TO DISMISS THE BILL HEREIN—Filed September 23, 1935

And now comes Lulu Nixon, one of the Defendants herein and moves the Court to dismiss the bill filed in this cause, because said bill does not state any matter of equity entitling plaintiffs to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiffs to any relief against this defendant.

Wherefore Defendant, Lulu Nixon, prays the judgment of this Court whether she shall further answer, and that she be dismissed with her costs.

William H. Vodrey, Attorney for Defendant, Lulu Nixon.

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[fol. 51] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 24, 1935

Now comes the defendants, Emma C. Cline, Nelle Dingledine and Lewis D. Riegle and on the records, pleadings and files in this cause, moves the Court to dismiss the Bill in Equity herein filed upon the following grounds, to-wit:

1. That it appears on the face of the said Bill in Equity that this Court has no jurisdiction of the defendants herein for the reason that the plaintiffs herein have an adequate remedy at law.

2. That there is a mis-joinder of parties defendant in said Bill for the reason that the liability of said defendants is several and not joint.

3. That it appears on the face of said Bill, by Plaintiffs' own showing, that they are not entitled to relief nor is either of them entitled to the relief prayed for by this Bill

against these defendants for the reason that the amount in controversy is less than Three Thousand Dollars.

4. That said Bill is in derogation of rights granted these defendants by the Fifth Amendment to the Constitution of the United States in that it seeks to deprive these defendants of trial by jury and to deprive them of property without due process of law.

Wherefore, and for divers and other good reasons of objection appearing on the face of said Bill, these defendants pray judgment of this Honorable Court whether they shall be compelled to make further or any answer to said Bill, and they humbly pray to be hence dismissed with their costs in this behalf sustained.

James E. Thomas, Attorney for Emma C. Cline, Nelle Dingledine and Lewis D. Riegle, Defendants.

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[fol. 52] IN UNITED STATES DISTRICT COURT

MOTION OF GEORGIANA DYE MALONE AND THEODORE C. DYE—Filed September 24, 1935

Now comes the Defendants, Georgiana Dye Malone and Theodore C. Dye, and moves this Honorable Court as follows:

1. Appearing specially for the purpose of this Motion only, not entering their appearance generally and protesting the jurisdiction of this Honorable Court over the Defendants, moves to quash the service of the Subpoena in equity upon these Defendants for the reason that this Court has no jurisdiction over their person.

2. Appearing specially for the purpose of this Motion only, not entering their appearance generally and protesting the jurisdiction of this Honorable Court over the Defendants, moves to dismiss the Bill of Complaint herein for the reason that upon the face of the said Bill this Court is without jurisdiction.

Ozias & Ozias, W. S. Rhotehamel, Attorneys for Defendants, Georgiana Dye Malone and Theodore C. Dye.

Filed within rule: Legler & Murray, Attorneys for Plaintiffs.

In United States District Court

Motion of J. L. P. Hannaford and Estella K. Buche to Dismiss—Filed September 25, 1935

Come now J. L. P. Hannaford and Estella K. Buche, defendants herein, and move the Court to dismiss the Bill of Complaint filed herein, for the following reasons:

1. Said bill does not state sufficient facts to constitute a valid cause of action in equity against said defendants.

[fol. 53] 2. The amount in controversy between plaintiffs and each of the defendants is less than $3,000.00.

Joseph Lemkuhl, 704 First Natl. Bank Bldg., Cincinnati, Ohio, Attorney for Defendants.

Notice

Messrs. Legler & Murray, Attorneys for Plaintiffs, Dayton, Ohio:

Please take notice that I will present the foregoing motion to dismiss, copy of which is enclosed, to the court on Monday, November 4, 1935, at 10:30 A. M.

Joseph Lemkuhl, Attorney for Defendants, J. L. P. Hannaford and Estella K. Buche.

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In United States District Court

Motion of Defendant, Jessie B. Rupp, to Dismiss Bill—Filed September 25, 1935

The defendant, Jessie B. Rupp, by her counsel, moves that the Bill herein be dismissed as to her, for the following reasons:

First. The amount sought by plaintiffs from this defendant is not within the jurisdictional requirement.

[fol. 54] Second. Said defendant is misjoined with numerous other defendants, against whom distinct causes of action are alleged and from whom different relief is sought.

C. A. Funkhouser, Byron Murr, Solicitors for Defendant.

Acknowledgment of Notice

Plaintiffs, by their counsel, acknowledge receipt of a copy of the foregoing Motion and Memorandum.

Legler & Murray, Solicitors for Plaintiffs.

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In United States District Court

Motion of Defendant, George B. Armstrong to Dismiss the Bill Herein—Filed September 26, 1935

And now comes, George B. Armstrong, one of the defendants herein, and moves the Court to dismiss the bill filed in this cause because said bill does not state any matter of Equity entitling plaintiffs to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiffs to any relief against this defendant.

Wherefore, defendant George B. Armstrong, prays the judgment of this Court whether he shall further answer, and that he be dismissed with his costs.

F. N. R. Redfern, Attorney for Defendant, George B. Armstrong.

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[fol. 55] In United States District Court

Motion of Harold R. Gebhart to Dismiss Bill of Complaint—Filed September 26, 1935

Now comes the Defendant Harold R. Gebhart and moves this Honorable Court as follows:

1. Appearing specially for the purpose of this Motion only, not entering his appearance generally and protesting the jurisdiction of this Honorable Court over the Defendant Gebhart, moves to quash the service of the Subpœna in equity upon this Defendant for the reason that this Court has no jurisdiction over his person.

2. Appearing specially for the purpose of this Motion only, not entering his appearance generally and protesting the jurisdiction of this Honorable Court over the Defendant Gebhart, moves to dismiss the Bill of Complaint herein

for the reason that upon the face of the said Bill this Court is without jurisdiction.

E. H. & W. B. Turner, Attorneys for the Defendant, Harold R. Gebhart.

Entry

Filed within rule.

Correct: Legler & Murray, Attorneys for the Plaintiff: E. H. & W. B. Turner, Attorneys for the Defendant, Harold R. Gebhart.

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[fol. 56] In United States District Court

Motion to Dismiss—Filed September 27, 1935

Now comes defendant, Charles B. Beckel, and moves the Court to dismiss such defendant from this case on the following grounds:

1. There is a misjoinder of parties;

2. An action against this defendant, if any lies, is not properly brought in equity, but can only be brought at law; and

3. The petition herein does not state facts sufficient to constitute a cause of action against this defendant.

Harry L. Munger, Eugene G. Kennedy, Attorneys for Defendant, Charles B. Beckel.

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In United States District Court

Motion to Dismiss—Filed September 28, 1935

Now comes the defendant, C. H. Loeffler, and moves that plaintiffs' petition be dismissed, and that this defendant be permitted to go hence without day for the following reasons:

1. That this defendant was not a party to the proceedings in Illinois, or to any other proceeding for the determination of the necessity of assessing the stockholders of said Bank.

2. That said petition shows on its face that the amount claimed against this defendant is less than Three Thousand Dollars ($3,000.00), and hence this action as to this defendant is not within the jurisdiction of this court.

[fol. 57] 3. The petition does not constitute a valid cause of action in equity.

4. There is a misjoinder of parties defendant, inasmuch as the liability sought to be enjoined is several and not joint.

C. H. Loeffler, Defendant, by H. N. & H. W. Lilley, His Attorneys.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 28, 1935

Now comes the defendant, Albert J. Berberich, and moves that plaintiffs' petition be dismissed, and that this defendant be permitted to go hence without day for the following reasons:

1. That this defendant was not a party to the proceedings in Illinois, or to any other proceeding for the determination of the necessity of assessing the stockholders of said Bank.

2. That said petition shows on its face that the amount claimed against this defendant is less than Three Thousand Dollars ($3,000.00), and hence this action as to this defendant is not within the jurisdiction of this Court.

3. The petition does not constitute a valid cause of action in equity.

4. There is a misjoinder of parties defendant, inasmuch as the liability sought to be enjoined is several and not joint.

Albert J. Berberich, Defendant, by H. N. & H. W. Lilley, His Attorneys.

[fol. 58] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed September 30, 1935

Now comes the defendant, Elmer B. Hoyle, and moves that plaintiffs' petition be dismissed, and that this defendant be permitted to go hence without day for the following reasons:

1. That this defendant was not a party to the proceedings in Illinois, or to any other proceeding for the determination of the necessity of assessing the stockholders of said Bank.

2. That said petition shows on its face that the amount claimed against this defendant is less than Three Thousand Dollars ($3,000.00), and hence this action as to this defendant is not within the jurisdiction of this court.

3. The petition does not constitute a valid cause of action in equity.

4. There is a misjoinder of parties defendant, inasmuch as the liability sought to be enjoined is several and not joint.

Elmer B. Hoyle, Defendant, by H. N. & H. W. Lilley, His Attorneys.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed October 1, 1935

Now comes William D. Harr, one of the defendants herein, and appearing specially for the purposes of this motion only, not entering his appearance generally, and protesting the jurisdiction of this Court over him, moves the Court to dismiss the Bill of Complaint as to him for the following reasons, towit:

[fol. 59] First. Said Bill of Complaint does not state facts sufficient to sustain a cause in equity against this defendant.

Second. The Bill of Complaint alleges ownership in this defendant of ten shares of the stock of the Chicago Joint

Stock Land Bank, of an alleged par value of One Hundred Dollars each, making a total par value of One Thousand Dollars, the amount claimed against this defendant, which is less than the amount necessary to confer jurisdiction.

William D. Haar, by J. C. Fullerton, Jr., Attorney.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 1, 1935

Now comes Margaret A. Ross and says that she is the duly qualified and acting guardian of John W. Brown, an incompetent person, by virtue of an order of the Probate Court of Miami County, Ohio.

Said guardian moves that plaintiffs' petition be dismissed, and that this defendant be permitted to go hence without day for the following reasons:

1. That this defendant was not a party to the proceedings in Illinois, or to any other proceeding for the determination of the necessity of assessing the stockholders of said Bank.

2. That said petition shows on its face that the amount claimed against this defendant is less than Three Thousand Dollars ($3,000.00), and hence this action as to this defendant is not within the jurisdiction of this Court.

3. The petition does not constitute a valid cause of action in equity.

[fol. 60] 4. There is a misjoinder of parties defendant, inasmuch as the liability sought to be enjoined is several and not joint.

Margaret A. Ross, Guardian of John W. Brown, an Incompetent Person, by H. N. & H. W. Lilley, Her Attorneys.

Filed within rule. Legler & Murray, Attorneys for Plaintiff.

October 1, 1935.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed October 1, 1935

Now comes the defendant, Charles A. Miller, and respectfully moves the Court to dismiss the Bill of Complaint heretofore filed herein for the reasons that:

First. Said Bill is insufficient in fact to constitute a valid cause of action in equity.

Second. Said Bill shows upon its face, and this defendant represents to the Court, that the person or persons entitled to collect the payment of the assessment heretofore made against the stockholders of the Chicago Joint Stock Land Bank of Chicago by the United States District Court for the Northern District of Illinois, Eastern Division, have an adequate and complete remedy at law therefor.

Said defendant further moves the Court to dismiss as parties defendant to this Bill all those persons who are alleged to have held less than thirty-one shares of the stock of Chicago Joint Stock Land Bank, for the reason that this Court is without jurisdiction as to such defendants.

R. E. Cowden, F. D. Schnacke, Solicitors for Defendant.

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[fol. 61] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, ROBERT F. STOEHR, JR., TO DISMISS BILL—Filed October 4, 1935

The defendant, Robert F. Stoehr, Jr., by his counsel, moves that the Bill herein be dismissed as to him, for the following reasons:

First. The amount sought by plaintiffs from this defendant is not within the jurisdictional requirement.

Second. Said defendant is misjoined with numerous other defendants, against whom distinct causes of action are alleged and from whom different relief is sought.

C. A. Funkhouser, Byron Murr, Solicitors for Defendant.

Acknowledgment of Notice

Plaintiffs, by their counsel, acknowledge receipt of a copy of the foregoing Motion and Memorandum.

Legler & Murray, Solicitors for Plaintiffs.

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In United States District Court

Motion of Peter W. Klinger—Filed October 5, 1935

1. The defendant, Peter W. Klinger, moves the Court to strike from the Bill of the plaintiffs herein all of paragraphs 9 and 10 thereof.

2. The said defendant moves the Court to dismiss the Bill filed in this case because said bill does not state any matter of equity entitling plaintiffs to the relief prayed for.

[fol. 62] Wherefore, defendant prays the judgment of this Court whether he shall further answer to the portion of the Bill which he asks shall be stricken or to the Bill as an entirety, and that he be dismissed with his costs.

W. S. McConnaughey, Harold F. Demann, Counsel for Peter W. Klinger.

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In United States District Court

Motion to Dismiss Bill of Complaint—Filed October 9, 1935

Now comes the defendants, Karl S. Meuche and Florence E. Meuche, and move the Court to dismiss the Bill of Complaint herein for the following reasons:

1. The Bill of Complaint does not state facts sufficient to constitute a valid cause of action in Equity.

2. There is a misjoinder of defendants and causes of action not affecting all parties.

3. The Court has no jurisdiction of the subject matter of the action, as the matter in controversy with respect to this defendant does not exceed Three Thousand ($3,000.00) Dollars exclusive of interest and costs.

Clement V. Jacobs, Solicitor for Defendants, Karl S. Meuche, and Florence E. Meuche.

[fol. 63] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed October 9, 1935

Now comes the defendant, Delmar G. Ubersax, and moves the Court to dismiss the Bill of Complaint herein for the following reasons:

1. The Bill of Complaint does not state facts sufficient to constitute a valid cause of action in Equity.

2. There is a misjoinder of defendants and causes of action not affecting all parties.

Clement V. Jacobs, Solicitor for Defendant, Delmar G. Ubersax.

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IN UNITED STATES DISTRICT COURT

MOTION OF NICHOLAS J. KUNTZ TO DISMISS—Filed October 11, 1935

Now comes the Defendant, Nicholas J. Kuntz, and moves the Court that he be dismissed as a Defendant in the above entitled cause, for the following reasons, to-wit:

1. That the facts set out in the Petition do not constitute a valid cause of action in equity.

2. That there is a misjoinder of parties defendant, inasmuch as the liability sought to be paid is several and not joint.

3. That Plaintiffs have an adequate and complete remedy at law.

Hollencamp & Lair, Solicitors for said Defendant.

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[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 14, 1935

The defendant, Mrs. William Lukaswitz, Jr., by her counsel, moves that the bill herein be dismissed as against her for the following reasons:

First. There is a misjoinder of parties defendant inasmuch as the liability sought to be enforced is several and not joint.

Second. That said petition shows on its face that the amount claimed against this defendant is less than $3,000.00 and since so far as this action pertains as against this defendant, the Court is without jurisdiction.

Third. That said bill is in derrogation of the rights granted this defendant by the Fifth Amendment to the Constitution of the United States in that it seeks to deprive these defendants of trial by Jury as well as to deprive them of property without due process of law.

Horace J. Boesch, Counsel for Mrs. William Lukaswitz, Jr.

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IN UNITED STATES DISTRICT COURT

MOTION OF H. C. KEVE—Filed October 15, 1935

Now comes the Defendant, H. C. Keve and moves this Honorable Court as follows:

1. Appearing specially for the purpose of this Motion only, not entering his appearance generally and protesting the jurisdiction of this Honorable Court over the Defendant, moves to quash the service of the Subpœna in equity upon this Defendant for the reason that this Court has no jurisdiction over his person.

[fol. 65] 2. Appearing specially for the purpose of this Motion only, not entering his appearance generally and protesting the jurisdiction of this Honorable Court over the Defendant, moves to dismiss the Bill of Complaint herein for the reason that upon the face of the said Bill this Court is without jurisdiction.

H. L. Ferneding, Attorney for the Defendant, H. C. Keve.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 23, 1935

Now comes Daniel Nevins, as Executor of the Estate of F. C. Gray, deceased, and for the purpose of this Motion

only, moves the Court to dismiss the bill filed herein against him, as such Executor, for the following reasons:

First. That the amount sought by Plaintiffs from this Defendant is not within the jurisdictional requirements.

Second. That there is a misjoinder of Defendants. This Defendant is joined with others, against whom distinct causes of action are alleged and from whom different relief is sought.

Daniel Nevins, Attorney.

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[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 23, 1935

Now comes defendant, Frank H. Herbst, as Executor of the will of William E. Herbst, deceased, and moves the Court to dismiss such defendant from this case on the following grounds:

1. There is a misjoinder of parties.

2. An action against this defendant, if any lies, is not properly brought in equity, but can only be brought at law; and

3. The petition herein does not state facts sufficient to constitute a cause of action against this defendant.

Harry L. Munger, Eugene G. Kennedy, Attorneys for Defendant, Frank H. Herbst, as Executor of the Will of William E. Herbst, Deceased.

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IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 26, 1935

Comes now C. J. Mattern as Executor of the Estate of R. Otto Baumann, deceased, and hereby enters his appearance herein for the purpose of this Motion alone, and represents to the Court that R. Otto Baumann died on the 5th day of February, 1935; that he is the duly appointed, qualified and acting executor of the estate of said

R. Otto Baumann, deceased, under and by virtue of the provisions of the last will and testament of said R. Otto Baumann, deceased and by appointment of the Probate Court of Montgomery County, Ohio, on the 27th day of [fol. 67] February, A. D. 1935; that the Probate Court of Montgomery County, Ohio is a Court of record of the State of Ohio and as such Court of record took jurisdiction of all matters pertaining to the administration of said estate on the 27th day of February A. D. 1935; that said estate is now in the process of administration under the laws of the State of Ohio and under the orders of said Court; that plaintiffs herein have not filed a claim with said executor setting forth what, if any, amount is due them from said estate as provided by the laws of the State of Ohio; that a Court of Record of the State of Ohio obtained jurisdiction of the subject matter of this action prior to the filing herein of the amendment to the Bill in Equity.

Wherefore, the defendant, C. J. Mattern as Executor of the Estate of R. Otto Baumann, deceased, moves the Court to dismiss the Amendment to the Bill in Equity heretofore filed herein, in so far as same is directed against him, for want of jurisdiction, and for his costs in this behalf incurred.

C. J. Mattern, Executor of the Estate of R. Otto Baumann, Deceased. R. A. Argabright, Attorney for Defendant.

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IN UNITED STATES DISTRICT COURT

AMENDMENT TO MOTION TO DISMISS BILL OF COMPLAINT—Filed November 4, 1935

Now come the defendants, The Western Securities Company, Mrs. Emma Coats, Henry E. Myers, L. Dale Dorney, Francis D. Schnacke and John Burlin Johnson, and as an amendment to their motion filed herein on September 13, 1935, respectfully move the Court to dismiss the Bill of [fol. 68] Complaint heretofore filed herein for the additional reason that the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00), and this Court is therefore without jurisdiction.

Roy G. Fitzgerald, R. E. Cowden, F. D. Schnacke, Solicitors for Said Defendants.

Receipt of copy of above Amendment to Motion acknowledged.

November 4, 1935.

Legler & Murray, Attorneys for Plaintiffs.

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IN UNITED STATES DISTRICT COURT

OBJECTIONS AND MOTION BY WESTERN SECURITIES COMPANY ET AL.—Filed November 4, 1935

1. The defendants, Western Securities Company, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman and Francis D. Schnacke, under leave of this Court, file these objections to the plaintiffs' amendment filed herein on or about October 7, 1935, to their original Bill, viz:

Said amendment is additional to, and not a substitute for, the original Bill, and offers additional allegations which relate solely to facts occurring before the filing of said original Bill, in violation of Equity Rules 19, 34 and 25.

[fol. 69] 2. Said defendants, in the alternative, move the Court to strike from the file said amendment on the same grounds set forth in the above objections thereto.

Roy G. Fitzgerald, R. E. Cowden, F. D. Schnacke,
Solicitors for said Defendants.

Receipt of copy of above Objections and Motion acknowledged.

November 4, 1935.

Legler & Murray, Attorneys for Plaintiffs.

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IN UNITED STATES DISTRICT COURT

AMENDMENT TO MOTION TO DISMISS BILL OF COMPLAINT—Filed November 4, 1935

Now comes the defendant, Charles A. Miller, and as an amendment to his motion filed herein on October 1, 1935, respectfully moves the Court to dismiss the Bill of Complaint heretofore filed herein for the additional

reason that the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00), and this Court is therefore without jurisdiction.

R. E. Cowden, F. D. Schnacke, Solicitors for said Defendants.

Receipt of copy of above Amendment to Motion acknowledged.

November 4, 1935.

Legler & Murray, Attorneys for Plaintiffs.

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[fol. 70] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed November 4, 1935

Comes now Andrew J. Christopher, Executor of the Estate of Sallie Christopher, deceased, one of the defendants herein, and on the records, pleadings and files in said cause, and moves the Court to dismiss the Bill in Equity of the plaintiffs upon the following grounds, to-wit:

1. That it appears on the face of said Bill of Equity that said Bill is wholly without equity.

2. That it appears on the face of said Bill that this Court has no jurisdiction in the subject matter of this suit, and no jurisdiction to herein determine the same.

3. That it appears on the face of said Bill that there is a misjoinder of parties defendant herein, in that the liability of any of the defendants is not joint.

4. That it appears on the face of the Bill by plaintiffs' own showing, that they are not entitled to, nor either of them entitled to the relief prayed for by this Bill against the defendant, nor to any relief arising from facts alleged in said Bill.

5. That it appears on the face of said Bill that the same is ambiguous therein in each of said respects, and in that it does not state the full Decree of the Court in the United States District Court for the Northern District of Illinois, Eastern Division, upon which the Bill filed herein is predicated.

Wherefore, and for divers and other good reasons of objection appearing on the face of said Bill, this defendant prays judgment of this Honorable Court whether it shall be compelled to make further or any answer to said Bill, and it humbly prays to be hence dismissed with its costs in this behalf sustained.

Neal Hunter, A. P. Mercer, H. P. Williamson, Attorneys for Defendant, Andrew J. Christopher, Executor of the Estate of Sallie Christopher, Deceased.

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[fol. 71] IN UNITED STATES DISTRICT COURT

MOTION OF MARY E. CLUNET TO STRIKE OUT PARTS OF PLAINTIFFS' AMENDMENT AND TO DISMISS SAID AMENDMENT—Filed November 4, 1935

Mary E. Clunet, named as a defendant, moves to strike out that part of plaintiffs' Amendment beginning with the words: "That Frances I. Parrott who is named as a defendant" and ending with the paragraph; for the reasons following:

1. Said Amendment attempts to make this defendant as executrix of the estate of said Frances I. Parrott a defendant herein, setting up against her an alleged cause of action which accrued (if at all) more than three years prior to commencement of suit, and which is barred by the provisions of the Ohio General Code, to-wit: Sections 10509-133, requiring that same be sued upon within two months after dispute or rejection, if then due, or within two months after becoming due, or be forever barred; and said Frances I. Parrott is alleged to have died on the 13th day of July 1934, and this defendant to have received letters testamentary as her executrix on the 19th day of said July; and under further provisions of said Ohio Code creditors were required to present their claims within four months after the executor's appointment (Section 10509-112); and no executor was to be held to answer to the suit of any creditor of the deceased unless it be commenced within two months after the expiration of nine months following his appointment (Section 10509-144); and said code provisions were in full force and effect during all the times hereinbefore noticed.

2. Said Amendment sets up against this defendant as said executrix a claim of debt which (if accruing at the time of the alleged decree) was non-existent at the time of death of the decedent named and was therefore not a debt of said decedent; and under the provisions of Ohio law an executor is required to pay only the debts of the decedent and certain other named expenses.

This defendant further moves to dismiss said Amendment as to her for the reasons stated.

Joseph W. Sharts, Attorney for Defendant, Mary E. Clunet.

Copy of Motion received November 4, 1935.

Legler & Murray, Attorneys for Plaintiffs.

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[fol. 72] IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING OBJECTIONS TO AMENDMENT TO BILL—Filed November 4, 1935

This matter came on to be heard upon objections to the amendment to the Bill filed October 7, 1935 and upon motions to strike same from the files and to strike out parts thereof by defendants was argued by counsel and submitted to the Court; whereupon the Court overrules such objections and motions to which defendants and each of them except. And the Court thereupon ordered that the amendment to the original Bill be considered and treated as an integral part of the original bill and that all motions to dismiss and all pleadings heretofore filed to the original bill shall be considered as directed to the original bill as so amended, to which ruling defendants severally except.

Dated and entered November 4, 1935.

Approved:

Nevin, Judge.

R. E. Cowden, Roy G. Fitzgerald, for Defendants. F. D. Schnacke, for Certain Defendants. Legler & Murray, Townley, Wild, Campbell & Clarke, (as to form only.)

IN UNITED STATES DISTRICT COURT

ENTRY DISMISSING BILL OF COMPLAINT—Filed November 5, 1935

This day this matter came on to be heard upon the motions, as amended, filed herein by various defendants to dismiss the Bill of Complaint and the amendment thereto, heretofore filed herein by the plaintiffs, and were argued by counsel and submitted to the Court.

[fol. 73] Upon consideration thereof the Court finds that said motions should be sustained for the reasons that said Bill as amended is insufficient to constitute a valid cause of action in equity; that the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3000.00), and that this Court is, therefore, without jurisdiction; and upon the grounds raised by all other motions.

It is, Therefore, Ordered that said motions be, and they hereby are, sustained and the Bill of Complaint herein is hereby ordered dismissed at plaintiffs' costs.

To all of which order and judgment of the Court said plaintiffs, by their counsel, except.

Nevin, U. S. District Judge.

Counsel for Plaintiffs have seen the above order and except thereto.

Townley, Wild, Campbell & Clark, Legler & Murray, Solicitors for Plaintiffs. Roy G. Fitzgerald, R. E. Cowden, F. D. Schnacke, Solicitors for Certain Defendants.

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[fol. 74] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed December 21, 1935

Plaintiffs, W. E. Brusselback and W. I. Bell, Stephen D. Forst, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, William M. Watson, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, believing themselves to be aggrieved by the final order of this Court made and entered on November 5, 1935, dismissing the Bill of Complaint as amended for the reason that the same is insufficient to constitute a

valid cause of action in equity; and that the matter in controversy does not exceed exclusive of interests and costs, the sum or the value of Three Thousand ($3,000.00) Dollars; and that the Court was therefore without jurisdiction and upon the grounds raised by all the motions of the various defendants herein, do hereby appeal therefrom to the Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and that a transcript of record, proceedings and papers upon which said order was made be duly authenticated and sent to the Circuit Court of Appeals for the Sixth Circuit.

W. E. Brusselback and W. I. Bell, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, William M. Watson, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, by Morris Townley, J. Arthur Miller and Geo. R. Murray, Their Solicitors. Townley, Wild, Campbell & Clark, 33 N. LaSalle Street, Chicago, Illinois; Legler & Murray, 407 Callahan Bank Bldg., Dayton, Ohio, Of Counsel.

Notice

To the solicitors representing various defendants herein:

You will take notice that a Petition for Appeal will be presented *in open Court to the Hon.* R. R. Nevin, *Judge of* the United States Court for the Southern District of Ohio, [fol. 75] Western Division, on December 21st, 1935, at 10:30 A. M.

Service of the above notice and a copy of the petition received this 9th day of December, 1935, together with copy of Assignment of Errors.

Roy G. Fitzgerald, Solicitor for Western Securities Co., Emma Coats, Henry E. Myers, L. Dale Dorney, Francis D. Schnacke, John Burlin Johnson, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman, Mary E. Clunet, Virginia Gohn, Mabel F. Beane, Carl W. Beane, Charles A. Ford, Samantha B. Harter, John Wehrly, Pearl H. Wehrly, and Mary E. P. Clunet as Executrix of the Estate of Frances I. Parrott, Deceased. R. E. Cowden, F. D. Schnacke, Solicitors for Western Securities Co., Emma Coats, Henry E. Myers,

L. Dale Dorney, Francis D. Schnacke, John Burlin Johnson, Charles A. Miller, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman and Arbella R. Bimm. Neal Hunter, by H. P. Williamson, Solicitor for Andrew Christopher and Andrew Christopher, Executor of the Estate of Sallie Christopher, Dec'd. A. P. Mercer, H. P. Williamson, Solicitors for Andrew Christopher and Andrew Christopher, Executor of the Estate of Sallie Christopher, Dec'd., and Third National Bank, Executor Estate George W. Weimer, Dec'd. E. H. & W. B. Turner, Solicitors for Edward T. Turner and Wellmore B. Turner, Trustees under Will of Earl H. Turner, Dec'd., J. D. Artz and Harold R. Gebhardt. Joseph W. Sharts, Solicitor for Mary E. Clunet, Virginia Gohn, Mabel F. Beane, Carl W. Beane, Charles A. Ford, Samantha B. Harter, John Wehrly, Pearl H. Wehrly. Harry L. Munger, Eugene G. Kennedy, Solicitors for Frank H. Herbst, Executor of Estate of William E. Herbst, [fol. 76] Dec'd., and Charles B. Beckel. W. S. McConnaughey, Harold F. Demann, Solicitors for Peter W. Klinger. Clement V. Jacobs, Solicitor for Karl S. Meuche, Florence E. Meuche, Delmar G. Ubersax. C. A. Funkhouser, Byron Murr, Solicitors for Robert E. Stoehr, Jr., Jessie B. Rupp. Daniel Nevins, Solicitor for Daniel Nevins, Executor of Estate of F. C. Gray, Dec'd. Horace J. Boesch, Solicitor for Mrs. William Lukaswitz, Jr. Hollencamp & Lair, Solicitors for Nicholas J. Kuntz. H. L. Ferneding, Solicitor for H. C. Keve, and H. L. Ferneding, T. A. Ferneding and Marie F. Keve, Executors of Estate of E. J. Ferneding, Dec'd. Ozias & Ozias and W. S. Rhotehamel, Solicitors for Georgiana Dye Malone and Theodore C. Dye. Wysong, Patricoff & Lautenburg, Solicitors for Alice Jane Russum, and Dr. Gale E. Russum, Guardian ad litem for Alice Jane Russum. Pickrel, Schaeffer, Harshman & Young, Solicitors for Zola B. Horrell and Gladys L. Smith. R. K. Landis, Irvin G. Bieser, Solicitors for Jacob A. Oneth, James M. Irvin, Admr. of Estate of Obed W. Irvin, Dec'd., Miriam Mathiot Brown, Katherine G. Mathiot, L. Dale Dorney and Emma M.

Wiedenbein. John W. Ratchford, Solicitor for Charles Sucher Packing Co. Murphy, Murphy & Mayl, Solicitors for Lyda B. Wiggim, Mariana Wiggim and Florence Wiggim Crist. Carroll Sprigg, Solicitor for Edward T. Lingham and John [fol. 77] M. Sprigg, Gdn. ad litem. Carl L. Shuler, by R. H. & N. K. Brumbaugh, Solicitor for Rose Ryan. James & Coolidge, Solicitors for J. Elliott Peirce, Fannie H. Peirce and John E. Parrott. F. N. R. Redfern, Solicitor for George B. Armstrong. Paxton & Seasongood, Solicitors for John D. Wachman. William H. Vodrey, Solicitor for Lulu Nixon. F. R. Hoover, 33 No. High St., Columbus, Ohio, Solicitor for Hugh A. Baldwin. H. N. & H. W. Lilley, Solicitors for C. H. Loeffler, Albert J. Berberich, Elmer B. Hoyle, John W. Brown, Margaret A. Ross, Guardian for John W. Brown, an Incompetent. James E. Thomas, Solicitor for Emma C. Cline, Nelle Dingledine and Lewis D. Riegle. Grover C. Brown, Milton W. Buffington, Solicitors for Henry V. Butler, Robert W. Stevenson and Elizabeth C. H. Sanborn. Joseph Lemkuhl, Solicitor for J. L. P. Hannaford and Estella K. Buche. J. C. Fullerton, Jr., Solicitor for William D. Harr.

Copies served on Ralph A. Argabright and C. J. Mattern, Solicitors for C. J. Mattern, Executor of Estate of R. Otto Bauman, dec'd.

Geo. R. Murray, Solicitor for Plaintiffs.

Copies served on Leonard Blum and Harry Kaplan, Solicitors for Ruth Rauh Stern by registered mail, December 9, 1935.

Geo. R. Murray, Solicitor for Plaintiffs.

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[fol. 78] IN UNITED STATES DISTRICT COURT

ENTRY ALLOWING APPEAL AND FIXING BOND—Filed December 21, 1935

The petition of complainants herein praying appeal from the final decree heretofore entered in this Court dismissing their bill of complaint, being now presented in open court,

It is hereby ordered that an appeal be allowed to the United States Circuit Court of Appeals for the Sixth Circuit as prayed for, and that a transcript of such part of the record and proceedings herein as the parties may by praecipe duly designate be transmitted, duly authenticated, to said United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, in the manner provided by law.

It appearing to the court that the plaintiffs have on deposit with the Clerk as security for costs the sum of $323.75 after securing all costs which have accrued herein to date, the Clerk is ordered to take the sum of $250.00 from said amount so deposited by the plaintiffs and pay the same into the registry of this Court, said $250.00 not to be released until the further order of this court and said sum to be taken and accepted as good and sufficient security that the appellants shall prosecute their appeal to execution, if they fail to make their plea good, shall acknowledge all costs.

Done and ordered in open court at Dayton, Ohio, on this 21st day of December, 1935.

Nevin, District Judge.

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IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed December 21, 1935

Now comes, W. E. Brukselback and W. I. Bell, Stephen D. Forst, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, William W. Watson, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, plaintiffs herein, by its solicitors, and having prayed an appeal from the decree entered in this cause on Novem- [fol. 79] ber 5, 1935, dismissing plaintiffs' bill heretofore filed in this cause for want of equity, respectfully show that said decree is erroneous and should be reversed and set aside, for the following reasons:

1. The Court erred separately in sustaining the several motions to dismiss the bill of complaint and the amendment thereto.

2. The Court erred in holding that said bill of complaint, and the amendment thereto, were insufficient to state or constitute a valid cause of action in equity.

3. The Court erred in holding that the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

4. The Court erred separately in dismissing the bill of complaint and the amendment thereto as against each of the defendants who filed a motion to dismiss.

5. The Court erred in dismissing the bill as to each of the defendants as against whom dismissal was ordered.

Wherefore, and in order that the foregoing Assignment of Errors may be and appear of record in this cause, W. E. Brusselback and W. I. Bell, Stephen D. Forst, Edward N. Heinz, William P. Hoyt, J. Frank Lyman, William M. Watson, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, plaintiffs herein, present the same to this Court, and pray that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided; that plaintiffs further pray that said final decree may be reversed and the District Court be directed to enter a decree in this cause in conformity with the prayer of the bill of complaint.

Dated at Dayton, Ohio, December 21st, 1935.

Morris Townley, J. Arthur Miller, Geo. R. Murray, Solicitors for Plaintiffs. Townley, Wild, Campbell & Clark, 33 N. LaSalle Street, Chicago, Illinois; Legler & Murray, 407 Callahan Bank Bldg., Dayton, Ohio, Of Counsel.

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[fol. 80] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed December 27, 1935

To the Clerk of the United States District Court for the Southern District of Ohio, Western Division:

You are hereby requested to certify the Transcript of Record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to an appeal from a Final Decree, herein allowed to the plaintiffs on the 21st day of December, 1935, and to include in such Transcript of Record the following papers:

1. Bill of Complaint.
2. Motion of plaintiffs for appointment of Receiver filed 9/13/35.
3. Motion of plaintiffs for leave to file amended bill filed 9/24/35.
4. Entry granting plaint-ffs leave to file amendment to bill, filed 10/7/35.
5. Amendment to Bill filed 10/7/35.
6. Motion of Andrew J. Christopher filed 9/13/35.
7. Motion of Third National Bank & Trust Co., Executor of the Estate of George W. Weimer, deceased, filed 9/13/35.
8. Motion of the Western Securities Company, Mrs. Emma Coats, Henry E. Myers, L. Dale Dorney, Francis D. Schnacke and John Burlin Johnson, filed 9/13/35.
9. Objections to Interrogatories and Motion to Dismiss of Robert E. Cowden, Francis D. Schnacke, Frank W. Nicholas and A. M. Zimmerman as incorporators and/or officers of the Western Securities Company, filed 9/13/35.
10. Motion of Lyda B. Wiggim, filed 9/14/35.
11. Motion of Mary E. Clunet, Virginia Gohn, Mabel F. Beane, Carl W. Beane and Mabel F. Beane named as joint tenants, Charles A. Ford, Samantha B. Harter, and John Wehrly and Pearl H. Wehrly named as joint tenants, filed 9/14/35.
12. Motion of The Chas. Sucher Packing Company, filed 9/14/35.
13. Motion of J. D. Artz, filed 9/14/35.
14. Motions of Edward T. Turner and Wellmore B. Turner as Trustees under the Will of Earl H. Turner, deceased, filed 9/14/35.

[fol. 81] 15. Motion of Jacob A. Oneth, James M. Irvin, as Administrator of the Estate of Obed W. Irvin, deceased, Miriam Mathiot Brown, Katherine G. Mathiot, L. Dale Dorney and Emma M. Wiedenbein, filed 9/14/35.

16. Motion of Gladys L. Smith, filed 9/14/35.
17. Motion of Zola B. Horrell, filed 9/16/35.
18. Notice of Motion to Dismiss of Alice Jane Russum, filed 9/17/35.
19. Motion of John D. Wachman, filed 9/18/35.
20. Motion of Lulu Nixon, filed 9/23/35.
21. Motion of Emma C. Cline, Nelle Dingledine and Lewis D. Riegle, filed 9/24/35.
22. Motion of Georgiana Dye Malone and Theodore G. Dye, filed 9/24/35.

23. Motion of J. L. P. Hannaford and Estella K. Buche, filed 9/25/35.

24. Motion of Jessie B. Rupp, filed 9/25/35.

25. Motion of George B. Armstrong, filed 9/26/35.

26. Motion of Harold R. Gebhart, filed 9/26/35.

27. Motion of Charles B. Beckel, filed 9/27/35.

28. Motion of C. H. Loeffler, filed 9/28/35.

29. Motion of Albert J. Berberich, filed 9/28/35.

30. Motion of Elmer B. Hoyle, filed 9/30/35.

31. Motion of William D. Harr, filed 10/1/35.

32. Motion of Margaret A. Ross, Guardian of John W. Brown, an incompetent person, filed 10/1/35.

33. Motion of Charles A. Miller, filed 10/1/35.

34. Motion of Robert F. Stoehr, Jr., filed 10/4/35.

35. Motion of Peter W. Klinger, filed 10/5/35.

36. Motion of Karl S. Meuche and Florence E. Meuche, filed 10/9/35.

37. Motion of Delmar G. Ubersax, filed 10/9/35.

38. Motion of Nicholas J. Kuntz, filed 10/11/35.

39. Motion of Mrs. William Lukaswitz, Jr., filed 10/14/35.

40. Motion of H. C. Keve, filed 10/15/35.

41. Motion of Daniel Nevins, as Executor of the Estate of F. C. Gray, deceased, filed 10/23/35.

42. Motion of Frank H. Herbst as Executor of the Will of William E. Herbst, deceased, filed 10/26/35.

[fol. 82] 43. Motion of C. J. Mattern as Executor of the Estate of R. Otto Baumann, deceased, filed 10/26/35.

44. Amendment to Motion of the Western Securities Company, Mrs. Emma Coats, Henry E. Myers, L. Dale Dorney, Francis D. Schnacke and John Burlin Johnson, field 11/4/35.

45. Objections and Motion of Western Securities Company, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman and Francis D. Schnacke, field 11/4/35.

46. Amendment to Motion of Charles A. Miller, filed 11/4/35.

47. Motion of Andrew J. Christopher, Executor of the Estate of Sallie Christopher, deceased, filed 11/4/35.

48. Motion of Mary E. Clunet to strike out parts of plaintiffs' Amendment and to Dismiss said Amendment, filed 11/4/35.

49. Entry overruling objections to amendment to bill, filed 11/4/35.

50. Entry dismissing Bill of Complaint at plaintiffs' costs, filed 11/5/35.

51. Petition for Appeal and Order allowing the same.

52. Assignment of Errors.

53. Notice of filing Petition for Appeal and Assignment of Errors together with acknowledgment of service.

54. Præcipe.

Morris Townley, J. Arthur Miller, Geo. R. Murray, Solicitors for Plaintiffs. Townley, Wild, Campbell & Clark, 33 N. LaSalle Street, Chicago, Illinois; Legler & Murray, 407 Callahan Bank Bldg., Dayton, Ohio, Of Counsel.

[fol. 83] Service of the Præcipe herein is hereby acknowledged, and copy of the same is received this 23rd day of December, 1935.

Roy G. Fitzgerald, Solicitor for Western Securities Co., Emma Coats, Henry E. Myers, L. Dale Dorney, Francis D. Schnacke, John Burlin Johnson, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman, Mary E. Clunet, Virginia Gohn, Mabel F. Beane, Carl W. Beane, Charles A. Ford, Samantha B. Harter, John Wehrly, Pearl H. Wehrly, and Mary E. P. Clunet as Executrix of the Estate of Frances I. Parrott, deceased. R. E. Cowden, F. D. Schnacke, Solicitors for Western Securities Co., Emma Coats, Henry E. Myers, L. Dale Dorney, Francis D. Schnacke, John Burlin Johnson, Charles A. Miller, Robert E. Cowden, Frank W. Nicholas, A. M. Zimmerman and Arbella R. Bimm. Neal Hunter, by H. P. Williamson, Solicitor for Andrew Christopher and Andrew Christopher, Executor of the Estate of Sallie Christopher, Dec'd. A. P. Mercer, H. P. Williamson, Solicitors for Andrew Christopher and Andrew Christopher, Executor of the Estate of Sallie Christopher, Dec'd., and Third National Bank, Executor Estate George W. Weimer, Dec'd. E. H. & W. B. Turner, Solicitors for Edward T. Turner and Wellmore B. Turner, Trustees under Will of Earl H. Turner, Dec'd., J. D. Artz and Harold R. Gebhart. Joseph W. Sharts, Solicitor for Mary E. Clunet, Virginia Gohn, Mabel F. Beane, Carl

W. Beane, Charles A. Ford, Samantha B. Harter, John Wehrly, Pearl H. Wehrly. Harry L. Munger, Eugene G. Kennedy, Solicitors for Frank H. Herbst, Executor of Estate of William E. Herbst, Dec'd., and Charles B. Beckel. W. S. McConnaughey, Harold F. Demann, Solicitors for Peter [fol. 84] W. Klinger. Clement V. Jacobs, Solicitor for Karl S. Meuche, Florence E. Meuche, Delmar G. Ubersax. C. A. Funkhouser, Byron Murr, Solicitors for Robert E. Stoehr, Jr., Jessie B. Rupp. Daniel Nevins, Solicitor for Daniel Nevins, Executor of Estate of F. C. Gray, Dec'd. Horace J. Boesch, Solicitor for Mrs. William Lukaswitz, Jr. Hollencamp & Lair, Solicitors for Nicholas J. Kuntz. H. L. Ferneding, Solicitor for H. C. Keve, and H. L. Ferneding, T. A. Ferneding and Marie F. Keve, Executors of Estate of E. J. Ferneding, Dec'd. Ozias & Ozias and W. S. Rhotehamel, Solicitors for Georgiana Dye Malone and Theodore C. Dye. Wysong, Patricoff & Lautenburg, Solicitors for Alice Jane Russum, and Dr. Gale E. Russum, Guardian ad litem for Alice Jane Russum. Pickrel, Schaeffer, Harshman & Young, Solicitors for Zolla B. Horrell and Gladys L. Smith. R. K. Landis, Irvin G. Bieser, Solicitors for Jacob A. Oneth, James M. Irvin, Admr. of Estate of Obed W. Irvin, Dec'd., Miriam Mathiot Brown, Katherine G. Mathiot, L. Dale Dorney and Emma M. Wiedenbein. John W. Ratchford, Solicitor for Charles Sucher Packing Co. Murphy, Murphy & Mayl, Solicitors for Lyda B. Wiggim, Mariana Wiggim and Florence Wiggim Crist. Carroll Sprigg, Solicitor for Edward T. Lingham and John M. Sprigg, Gdn. ad litem. Carl L. Shuler, by R. H. & N. K. Brumbaugh, Solicitor for Rose Ryan. James & [fol. 85] Coolidge, Solicitors for J. Elliott Peirce, Fannie H. Peirce and John E. Parrott. Paxton & Seasongood, Solicitors for John D. Wachman. William H. Vodrey, Solicitor for Lulu Nixon. F. R. Hoover, 33 No. High St., Columbus, Ohio, Solicitor for Hugh A. Baldwin. H. N. & H. W. Lilley, Solicitors for C. H. Loeffler, Albert J. Berberich, Elmer B. Hoyle, John W. Brown, Margaret A. Ross, Guardian for John W. Brown, an Incompetent.

James E. Thomas, Solicitor for Emma C. Cline, Nelle Dingledine and Lewis D. Riegle. Grover C. Brown, Milton W. Buffington, Solicitors for Henry V. Butler, Robert W. Stevenson and Elizabeth C. H. Sanborn. Joseph Lemkuhl, Solicitor for J. L. P. Hannaford and Estella K. Buche. J. C. Fullerton, Jr., Solicitor for William D. Harr.

Copy served on Ralph A. Argabright and C. J. Mattern, Solicitors for C. J. Mattern, Executor of Estate of R. Otto Bauman, Dec'd.

Geo. R. Murray, Solicitor for Plaintiffs.

Copy served F. N. R. Redfern, Solicitor for George B. Armstrong by registered mail, December 23, 1935.

Geo. R. Murray, Solicitor for Plaintiffs.

Copy served on Leonard Blum and Harry Kaplan, Solicitors for Ruth Rauh Stern by registered mail, December 9, 1935.

Geo. R. Murray, Solicitor for Plaintiffs.

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[fol. 86] Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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## CAUSE ARGUED AND SUBMITTED

(Novemer 4, 1936—Before: HICKS, SIMONS and ALLEN, JJ.).

This cause is argued by J. A. Miller for Appellants and by R. G. Fitzgerald and F. Schnacke for Appellees and is submitted to the Court.

## DECREE

(Filed December 15, 1936)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this court.

**OPINION**

(Filed December 15, 1936)

Before HICKS, SIMONS and ALLEN, Circuit Judges.

HICKS, Circuit Judge. The bill of complaint alleged: That plaintiffs were citizens and residents of Missouri and Illinois; that plaintiff, Brusselback, owned bonds of the Chicago Joint Stock Land Bank (created under the Federal Farm Loan Act, 39 Stat. 360, U. S. C. Tit. 12, §641) in the amount of $4,000.00 and that the remaining plaintiffs, as trustees, owned its bonds in the amount of $128,000.00; that certain defendants, citizens of Ohio, were stockholders of the bank; that certain others were incorporators and officers of the Western Securities Company, holding 759 shares of the stock of the bank; that the Western Securities Company was organized as a subterfuge through which the real owners of the shares of the bank, whose names were unknown, sought to escape their statutory liability; that plaintiffs as bondholders of the bank brought their suit as a class action on behalf of all other bondholders and creditors thereof; that the bank had a capital stock of the par value of four million dollars, divided into forty thousand shares of the par value of $100.00 each; that the shares were originally sold for approximately four million dollars in cash, which was paid into its treasury; that it was incorporated in 1917 and continued business until October 1, 1932; that it issued and sold its own bonds, having a face value of more than forty-two million dollars at par, or approximately par, and invested the proceeds principally in farm mortgages; that on October 1, 1932, it was declared insolvent by the Federal Farm Loan Board and its assets were turned over to a receiver who has since been engaged in their liquidation; that about October 1, 1932, certain bondholders of the bank filed their bill in the United States District Court for the Northern District of Illinois against its stockholders for the purpose of enforcing their individual liabilities under the statute (Tit. 12, § 812, U. S. C.); that service was had upon all stockholders found residing in Illinois who for the most part answered; that the cause was referred to a Master who found the bank insolvent in that its liabilities exceeded its assets by approximately twelve million dollars and that an assessment of 100% against the stockholders

would be necessary; that a decree was entered confirming the Master's report and making a 100% assessment against the stockholders and that the defendants who were before the court were directed to pay such assessments to the receiver who was originally appointed by the Federal Farm Loan Board and reappointed by the court; that the decree was binding not only upon Illinois stockholders who were before the court but upon all stockholders of the bank wherever residing.

The bill prayed that it might be treated as a class suit on behalf of all creditors of the bank for the purpose of enforcing the assessment decreed by the Illinois District Court against defendants resident in Ohio, to the end that there be provided a fund to be administered by the court for the equal benefit of all creditors of the bank; that a decree be entered against defendant stockholders directing and ordering them to pay their assessments; that a receiver be appointed for the fund to be realized and that it be administered and distributed by the court ratably and equitably among the creditors of the bank. The bill also prayed for any needed discovery. It was later amended so as to aver the death of certain defendants and to allege the existence of their personal representatives.

Various defendants moved to dismiss the bill. The court sustained the motion, hence this appeal.

The gravamen of the court's action was that the bill was not sustainable for lack (1) of jurisdiction in equity; and (2) of the requisite statutory amount involved. We think otherwise.

The suit was instituted after the decision in *Wheeler* v. *Greene,* 280 U. S. 49, and was properly brought as a class action. *Brusselback* v. *Cago Corp'n,* 85 Fed. (2d) 20 (C. C. A. 2). The alleged liability of defendants arose out of Title 12, § 812, U. S. C., printed in the margin.[1] It is an obligation to be borne equally and ratably by all defendants. When enforced, its proceeds go into a common fund which when made ready for distribution should be shared equally and ratably by all creditors. *Alsop* v.

[1] "§ 812. Individual liability of shareholders.

Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

*Conway,* 188 Fed. 568, 575 (C. C. A. 6). No creditor may disregard the rights of others and subject the fund or any portion of it in a suit at law to the satisfaction of his individual claim. In *Terry* v. *Little,* 101 U. S. 216, the charter of the bank provided that upon its failure the stockholders should be liable for any sum not exceeding twice the amount of the shares. At page 217 the court said:

> "This, as we think, means that on the failure of the bank each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is, in legal effect, for a proportionate liability by all stockholders. Undoubtedly, the object was to furnish additional security to creditors, and to have the payments when made applied to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, it must be enforced by or for all. The form of the action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution. As the liability of the stockholder is not to any individual creditor, but for contribution to a fund, out of which all creditors are to be paid alike, the appropriate remedy is by suit to enforce the contribution, and not by one creditor alone to appropriate to his own use that which belongs to others equally with himself."

"Equality is equity," or, stated in another form, "Equity delighteth in equality." An equity court is clothed with power to collect, take into custody, conserve and distribute such fund, pro rata, among the creditors who may show themselves entitled to it. All creditors have the right in one and the same suit to have their claims adjudicated and to contest the claims of others. Each defendant has a corresponding right to interpose such individual defenses as may seem applicable. Thus the various equities among all the parties both plaintiff and defendant may be effectually and com-

pletely adjudicated in one decree. If plaintiffs should establish a right to discovery touching the affairs of the defendant, Western Securities Company, equity has ample power to compel it. The machinery of a law court is wholly inadequate for such effective and complete relief.

Appellees contend that the jurisdictional amount is fixed by the separate liability of each defendant which they construe to be less than $3000.00 but such is not the test by which jurisdiction is determined. The amount in controversy is the value of the fund to be collected and distributed. See *Brusselback* v. *Cago Corp'n,* supra (p. 23); *Brusselback* v. *Chicago Joint Land Bank,* 85 Fed. (2d) 617, 619 (C. C. A. 7). It is only fair to the District Judge to say that the cases just cited were undetermined when the decree below was entered.

The decree is reversed and the cause remanded for further proceedings consistent herewith.

**ORDER DENYING PETITION FOR REHEARING**

(Filed March 9, 1937)

The petition to rehear is denied.

**UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT**

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *W. E. Brusselback, et al,* v. *Herman D. Arnovitz, et al,* No. 7344, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 15th day of May, A. D. 1937.

J. W. MENZIES,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

(SEAL)

[fol. 100] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Brandeis took no part in the consideration and decision of this application.

Mr. Justice Black took no part in the consideration and decision of this application.

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Endorsed on cover: File No. 41,589. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 108. Andrew J. Christopher, Third National Bank & Trust Co., as Executor of the Estate of George W. Weimer, Deceased, et al., petitioners, vs. W. E. Brusselback and W. I. Bell, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed June 2, 1937. Term No. 108, O. T., 1937.

FILE COPY

JUN 2 1937
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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# No. 108

---

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

*Petitioners,*

VS.

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
*Counsel for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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# No. 108

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ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED; THE WESTERN SECURITIES COMPANY, EMMA COATS, HENRY E. MYERS, L. DALE DORNEY, FRANCIS D. SCHNACKE, JOHN BURLIN JOHNSON, ROBERT E. COWDEN, FRANK W. NICHOLAS, A. M. ZIMMERMAN, LYDA B. WIGGIM, MARY E. CLUNET, VIRGINIA GOHN, MABEL F. BEANE, CARL W. BEANE, CHARLES A. FORD, SAMANTHA B. HARTER, JOHN WEHRLY, PEARL H. WEHRLY, THE CHAS. SUCHER PACKING COMPANY, J. D. ARTZ, EDWARD T. TURNER AND WELLMORE B. TURNER, AS TRUSTEES UNDER THE WILL OF EARL H. TURNER, DECEASED; JACOB A. ONETH, JAMES M. IRVIN, AS ADMINISTRATOR OF THE ESTATE OF OBED W. IRVIN, DECEASED; MIRIAM MATHIOT BROWN, KATHERINE G. MATHIOT, EMMA M. WEIDENBEIN, GLADYS L. SMITH, ZOLA B. HORRELL, ALICE JANE RUSSUM, JOHN D. WACHMAN, LULU NIXON, EMMA C. CLINE, NELLE DINGLEDINE, LEWIS D. RIEGLE, GEORGIANA DYE MALONE, THEODORE C. DYE, J. L. P. HANNAFORD, ESTELLA K. BUCHE, JESSIE B. RUPP, GEORGE B. ARMSTRONG, HAROLD R. GEB-

HART, CHARLES B. BECKEL, C. H. LOEFFLER, ALBERT J. BERBERICH, ELMER B. HOYLE, WILLIAM D. HARR, MARGARET A. ROSS, as Guardian of John W. Brown, an Incompetent Person; CHARLES A. MILLER, ROBERT F. STOEHR, Jr., PETER W. KLINGER, KARL S. MEUCHE, FLORENCE E. MEUCHE, DELMAR G. UBERSAX, NICHOLAS J. KUNTZ, MRS. WILLIAM LUKASWITZ, Jr., H. C. KEVE, DANIEL NEVINS, as Executor of the Estate of F. C. Gray, Deceased; and ANDREW J. CHRISTOPHER, as Executor of the Estate of Sallie Christopher, Deceased,

*Petitioners,*

vs.

W. E. BRUSSELBACK and W. I. BELL, STEPHEN D. FORST, EDWARD N. HEINZ, WILLIAM P. HOYT, J. FRANK LYMAN, WILLIAM M. WATSON, as Trustees of the Retirement Board of the Park Employees' Annuity and Benefit Fund of Chicago, Illinois,

*Respondents.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

---

Solicitors for the petitioners, Andrew J. Christopher and others, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on December 15, 1936 (R. 87) (87 F. (2d) 761), reversing the judgment of the District Court of the United States for the Southern District of Ohio, Western Division (R. 72).

A petition for rehearing (R. 93) was filed on January 12, 1937, in said Circuit Court of Appeals, and was denied on March 9, 1937 (R. 99). The full title of this case, showing the names of all defendants, appears in the Bill of Complaint (R. 1).

**Statement of Case.**

Respondents, as creditors of The Chicago Joint Stock Land Bank, filed a bill in equity to collect the theretofore determined shareholders' double liability assessment against the shareholders of that bank.

The respondents' bill of complaint recites (R. 5) that in October, 1932, a class suit in equity to establish the double liability of the shareholders of The Chicago Joint Stock Land Bank was instituted in the United States District Court for the Northern District of Illinois, at Chicago. In that bill there were named as defendants The Chicago Joint Stock Land Bank and all of its shareholders, exceeding one thousand in number. Service was had on all shareholders residing in Illinois who could be found. No service was attempted upon non-resident shareholders, and none of the Ohio shareholders was served, appeared, or defended.

The bill alleges that the matter was referred to a master, and that his report, which was adopted by the Court, found that the Bank was insolvent to the extent of approximately twelve million dollars ($12,000,000.00) and recommended that an assessment of one hundred per cent (100%) should be levied against all shareholders (R. 5, 32). This levy was made by the Chicago decree (R. 31), dated August 5, 1935.

Subsequently, on August 8, 1935, respondents instituted this present action in the District Court in the Southern District of Ohio against all shareholders resident in Ohio to collect the assessments theretofore determined and levied

in the Chicago decree. Their bill of complaint alleges (R. 5) that said Chicago decree is effective and binding on all of the shareholders of the Bank, wherever residing, and whether of record or otherwise, and that it effectively adjudicates against the defendants named in such bill of complaint that all of the shareholders of the bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent (100%) of the par value of the shares held by them. No allegation as to the insolvency of the Bank or the necessity of making an assessment against its stockholders was contained in the bill.

Petitioners filed a large number of motions to dismiss upon various grounds which may be classified for the purpose of convenience into three principal issues:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity; and

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either at law or in equity; and

3. The bill of complaint does not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00).

The District Court dismissed the bill of complaint (R. 72, 73) on the following grounds:

1. That said bill, as amended, is insufficient to constitute a valid cause of action in equity;

2. That the matter in controversy does not exceed, exclusive of costs and interest, the sum or value of three thousand dollars ($3,000.00); and

3. Upon the grounds raised by all other motions.

Thereafter, the complainants, failing to amend their bill of complaint and treating the decree of the District Court as final, appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 74, *et seq.*). That court reversed the decree of said District Court and remanded the case to said District Court (R. 87). It is this decree of reversal which the petitioners now seek to have reviewed by this Court:

**Questions Presented.**

1. Whether a bill in equity filed by creditors of a Federal joint stock land bank against holders of shares in such bank to collect a one hundred per cent (100%) assessment of double liability on such shares theretofore made and levied by the United States District Court in the district where such bank is located in an action in which such shareholders were neither served with process, nor appeared or defended, is sufficient to state a good cause of action against such shareholders *when it contains no allegations as to the insolvency of such bank or as to the necessity for such an assessment,* merely alleging that such an assessment is binding on such shareholders?

2. Whether a bill in equity filed by creditors of a Federal joint stock land bank against representatives of estates of deceased persons who at the time of their deaths were owners of shares in such bank to collect a one hundred per cent (100%) assessment of double liability on such shares theretofore made and levied, is sufficient to state a good cause of action against such representatives *when it does not allege presentation of claims for such assessment to such representatives, as required by the local probate laws in the state where such bill is filed?*

## Statutes Involved.

The Federal Farm Loan Act (July 17, 1916, C. 245, §16, 39 Stat. 374, 12 U. S. C. A. §812) provides:

> "Shareholders of every joint stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

The provisions of Probate Code of the State of Ohio (G. C. 10509-1, *et seq.*), pertinent to the presentation of claims against decedents' estates, are set forth in the appendix.

## Specification of Errors.

The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court dismissing the bill of complaint, on the grounds that:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or necessity for the assessment.

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, against those defendants who are representatives of estates of deceased shareholders, for the reason that said bill does not allege the presentation of the claims for the assessment to such representatives, as required by the General Code of Ohio.

3. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity for the following reasons:

a. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

b. There is no trust fund involved.

c. This is not a true class suit.

d. A class suit is unnecessary in this case.

e. Multiplicity of suits is not alone sufficient basis for equity jurisdiction, and never by plaintiffs.

4. The bill of complaint, as amended, does not state facts sufficient to show the required jurisdictional amount of in excess of Three Thousand Dollars ($3,000.00), for the following reasons:

a. Andrew J. Christopher owns but seven (7) shares of stock and many of the defendants own less than thirty-one (31) shares, alleged by complainants to have a par value of One Hundred Dollars ($100.00).

b. The defendants who own more than thirty (30) shares of stock each cannot be sued *in this action* for more than their proportionate liability *to these complainants,* which in every instance is less than Three Thousand Dollars ($3,000.00), even when calculated on the basis of a par value of One Hundred Dollars ($100.00) per share.

5. The bill of complaint, as amended, exhibits on its face a misjoinder of defendants, and a misjoinder of causes of action.

6. The bill of complaint, as amended, exhibits on its face a defect of parties plaintiff.

**Reasons for Granting the Writ.**

1. There is a conflict of decisions between two United States Circuit Courts of Appeals. When this case was before the District Court, motions were filed by some of the Defendants to dismiss the bill of complaint on the grounds that sufficient facts to constitute a good cause of action were not stated in the bill. These motions were sustained by the District Court. On appeal, this decree of dismissal was reversed by the Circuit Court of Appeals for the Sixth Circuit. By so reversing this decree of dismissal, said Circuit Court of Appeals in effect held that the bill of complaint did state sufficient facts to constitute a good cause of action to collect the assessment theretofore levied by the District Court for the Northern District of Illinois, in an action in which the defendant shareholders were neither served with process, nor appeared or defended. In essence, said Circuit Court of Appeals held that a decree of assessment rendered by Illinois District Court is binding and effective upon all shareholders wherever they may reside and whether or not they were served with process, appeared, or defended in that action. This decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Holmberg et al.* v. *Carr*, 86 F. (2d) 727, decided December 7, 1936. This was a suit in equity by creditors of the Southern Minnesota Joint Stock Land Bank of Minneapolis to collect from shareholders resident in New York an assessment of double liability on the stock of that bank previously made by a District Court in Minnesota in an action in which said New York stockholders were not served with process. At page 729, the Court says:

> "The bill at bar, as drafted, depends altogether upon what was done in the district court of Minnesota; it does not allege the facts upon which the liability de-

pends, but only their adjudication by that court; hence it can depend only upon the conclusiveness of the assessment there found."

As to the conclusiveness of that assessment, the Court says, at page 730:

"Therefore we hold that the assessment in the district court has no extraterritorial effect, and that the bill should have been dismissed."

2. In the case at bar the Circuit Court of Appeals for the Sixth Circuit has decided an important question of local Ohio law in conflict with applicable Ohio decisions. When this case was before the District Court, motions were filed by some of the defendants to dismiss the bill of complaint on the grounds that sufficient facts to constitute a good cause of action were not stated in the bill. These motions were sustained by the District Court. On appeal this decree of dismissal was reversed by the Circuit Court of Appeals for the Sixth Circuit. By so reversing this decree of dismissal, said Circuit Court of Appeals in effect held that said bill of complaint did state facts sufficient to constitute a good cause of action against those defendants who were representatives of estates of deceased shareholders, even though said bill did not allege presentment of such claims for the assessment to such representatives, as required by the probate statutes of Ohio. In *Beach* v. *Mizner, Ex'r*, 131 O. S. 481, a suit was brought against the executor of an estate to recover on a subscription of stock in a building and loan association. In its opinion, the Court states the question presented as follows:

"The defendant contends that the plaintiff's petition is demurrable because it does not allege that the claim was presented to him as executor within four months after his appointment, as provided by Section 10509-112, General Code (114 Ohio Laws, 320), and contains

no allegation to the effect that the plaintiff obtained leave from the Probate Court to file his claim for allowance, as provided by Section 10509-134, General Code (114 Ohio Laws, 320).

The Supreme Court of Ohio decides the question thus presented as follows, at page 487:

> "Since the plaintiff failed to allege that his claim was presented within four months or later upon leave first obtained from the Probate Court, the judgment of the Court of Appeals (which sustained the demurrer) must be affirmed."

Thus the decision of the Circuit Court of Appeals for the Sixth Circuit, reversing the dismissal by the District Court of the bill of complaint which did not contain the allegations referred to in *Beach* v. *Mizner, Ex'r,* presents a clear conflict with the decision of the Supreme Court of Ohio in that case.

For these reasons it is respectfully submitted that this petition should be granted.

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
*Counsel for Petitioners.*

Dated at Dayton, Ohio, May 20th, 1937.

VERIFICATION AND CERTIFICATE OF COUNSEL.

STATE OF OHIO,
*County of Montgomery, ss:*

Wellmore B. Turner, Roy G. Fitzgerald, Robert E. Cowden, and Howard P. Williamson each for himself, upon oath say that they are attorneys for some of the petitioners in the foregoing petition; that they have read the said petition

and have personal knowledge of the matters and things therein set forth, and believe the same to be true.

Affiants further state that the said petition for certiorari is prepared and filed in the utmost good faith, believing that the same is meritorious, and that said petition is not prepared and presented in order to delay the final opinion and judgment in the case.

WELLMORE B. TURNER,
ROY G. FITZGERALD,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON.

Sworn to before me and subscribed in my presence this 20th day of May, 1937.

[SEAL.]

LUDWICA RATERMAN,
*Notary Public in and for*
*Montgomery County, Ohio.*

My Commission Expires August 2, 1938.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### The Opinions of the Courts Below.

The District Court for the Southern District of Ohio, Western Division, did not deliver a written opinion. The judgment entered in that Court appears at page 72, 73, of the Record of this case.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, to which an appeal was taken, was delivered on December 15, 1936, and is reported in 87 F. (2d) 761. It appears on page 88 of the Record.

### II.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stat. 939, 28 U. S. C. A. § 347.

The judgment of the Circuit Court of Appeals was entered December 15, 1936 (R. 87). A petition for rehearing was filed January 12, 1937, within the time provided by the rules of the Circuit Court of Appeals (R. 93). The petition for rehearing was denied March 9, 1937 (R. 99).

### III.

### Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration on the facts will be made in the course of the argument which follows.

## IV.

### Specification of Errors.

The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court dismissing the bill of complaint, on the grounds that:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or necessity for the assessment.

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, against those defendants who are representatives of estates of deceased shareholders, for the reason that said bill does not allege the presentation of the claims for the assessment to such representatives, as required by the General Code of Ohio.

3. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity for the following reasons:

a. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

b. There is no trust fund involved.

c. This is not a true class suit.

d. A class suit is unnecessary in this case.

e. Multiplicity of suits is not alone sufficient basis for equity jurisdiction, and never by plaintiffs.

4. The bill of complaint, as amended, does not state facts sufficient to show the required jurisdictional amount of in

excess of Three Thousand Dollars ($3,000.00), for the following reasons:

a. Andrew J. Christopher owns but seven (7) shares of stock and many of the defendants own less than thirty-one (31) shares, alleged by complainants to have a par value of One Hundred Dollars ($100.00).

b. The defendants who own more than thirty (30) shares of stock each cannot be sued *in this action* for more than their proportionate liability *to these complainants,* which in every instance is less than Three Thousand Dollars ($3,000.00), even when calculated on the basis of a par value of One Hundred Dollars ($100.00) per share.

5. The bill of complaint, as amended, exhibits on its face a misjoinder of defendants, and a misjoinder of causes of action.

6. The bill of complaint, as amended, exhibits on its face a defect of parties plaintiff.

## V.

## Summary of the Argument.

Point A. The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege the facts necessary to establish the insolvency of the bank and the necessity for the assessment, and relied merely upon the decree of the District Court in Chicago as to those elements.

Point B. The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as to those defendants who represent estates of

deceased shareholders, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege presentation of the claims to such representatives, as required by the statutes and decisions of the State of Ohio.

## VI.

## ARGUMENT.

### Point A.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege the facts necessary to establish the insolvency of the Bank and the necessity for the assessment, and relied merely upon the decree of the District Court in Chicago as to those elements.**

It is submitted by counsel for petitioners that there is a clear conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in this case and the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Holmberg et al.* v. *Carr*, 86 F (2d) 727. In the latter case the court held that an assessment levied by a District Court in Minnesota on the shareholders of a Minnesota joint stock land bank is without extraterritorial effect, requiring dismissal of a bill filed by creditors in a Federal court in New York to collect such an assessment against New York shareholders, where the bill does not allege the facts underlying the liability for the assessment. The failure of the complainants in that case to allege the facts upon which the liability for the assessment depended was held by the court to require the dismissal of the bill. The bill in the instant case not only fails to allege those facts as to the basis of the liability, but it expressly alleges

that the complainants are relying upon the decree of the District Court in Chicago as adjudicating those facts and that liability with respect to these Ohio defendants, and the Circuit Court of Appeals refused to dismiss this bill. Thus we have on one hand the Circuit Court of Appeals for the Second Circuit holding that a decree rendered by a district court in one state determining the necessity for, and making an assessment of statutory double liability on joint stock land bank stock has no extraterritorial effect, is not binding on shareholders residing in other states, and may not be made the basis for a bill in equity in another state to collect an assessment so made; and on the other hand we have the Circuit Court of Appeals for the Sixth Circuit refusing to dismiss a bill to collect such an assessment which not only fails to allege the underlying facts regarding the liability, but expressly alleges that such an assessment is binding on shareholders in other states.

It is important that this situation be clarified by having this conflict resolved one way or the other. As is apparent from these two conflicting decisions, both The Chicago Joint Stock Land Bank and the Southern Minnesota Joint Stock Land Bank of Minneapolis have been declared insolvent by the Federal Farm Loan Board and assessments of the statutory double liability have been made by the district courts in the districts in which said two banks are located. The same creditors in this case and the same creditors in the *Carr* case, *supra,* have filed actions of various kinds in other states to collect the assessments so made, and the conflict in decisions noted above has caused great confusion as to the proper method of procedure.

Congress having provided no machinery for the collection of such liability, conflicts have arisen in the federal and state courts involving a multitude of people in a number of states.

## Point B.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as to those defendants who represent estates of deceased shareholders, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege presentation of the claims to such representatives, as required by the statutes and decisions of the State of Ohio.**

The bill of complaint in this case, which was amended to make parties the representatives of estates of deceased shareholders, contains no allegations as to compliance with the provisions of the probate statutes of the State of Ohio with reference to claims against decedents' estates. The pertinent sections of the Ohio General Code are as follows:

> "§ 10509-112. Presentation, allowance and rejection of claims.—Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or reject all claims, except contingent claims, within thirty days after their presentation. Any claims presented after the time herein provided shall not prevail as against *bona fide* purchasers or as against executors and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against *bona fide* distributees. (R. S. § 6109; 38 v. 146, § 99; S. & C. 584; 102 v. 200; 114 v. 320, §1,)"

> "§ 10509-133. Action on rejected claim barred, when. —When a claim against the estate of a deceased person has been presented to the executor or administrator,

and has been rejected by him in whole or in part, but not referred to referees, or if a claim has been allowed by the executor or administrator in whole or in part and thereafter rejected or further reduced by the court, the claimant or person deriving title from him, must commence an action thereon within two months after receipt of actual notice of such rejection or reduction, if the debt or any part of it be then due, or within two months after some part of it becomes due, or be forever barred from maintaining an action thereon; except that, in the event of the death, resignation or removal of such executor or administrator, within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor; and provided that no claimant shall be permitted to bring an independent action on his claim after it has been heard and decided on the merits on exceptions to the schedule of debts filed by him.

"For the puposes of this section the action of a claimant shall be deemed to have been commenced when the petition and praecipe for service of summons on the executor or administrator have been duly filed. (R. S. §6097; 38 v. 146, §90; S. & C. 582; 114 v. 320 (431); 116 v. 385 (400), §1. Eff. Sept. 2, 1935.)"

"§10509-134. Reinstatement of barred claim.—Upon petition filed by a creditor or person deriving title from him, whose claim has not been presented within the time prescribed by law, the probate court, if after notice to all interested parties and hearing, it is of the opinion that justice and equity so require, and that the petitioner is not chargeable with culpable neglect in failing to present his claim within the time so prescribed, may permit petitioner to file his claim for allowance, but such allowance shall not effect any payment or distribution made before the filing of such claim, nor shall it prejudice the rights of creditors whose claims were filed within the time prescribed by law. (114 vs. 320, §1.)"

Construing these sections in the recent case of *Beach* v. *Miener, Ex'r*, 131 O. S. 481, the Supreme Court of Ohio held that a petition against the executor of an estate which did not allege a presentation of the claim to the executor within four months of the date of appointment or later upon leave first obtained from the Probate Court did not state facts sufficient to constitute a good cause of action. The same construction of these statutes was given by an Ohio Court of Appeals in the unreported case of *Holmberg et al.* v. *Third National Bank & Trust Company, Executor, et al.;* which was a suit brought at law against the executor of a deceased shareholder of the Southern Minnesota Joint Stock Land Bank to collect the assessment hereinbefore referred to in connection with *Holmberg et al.* v. *Carr*, 86 F. (2d) 727. The Ohio Court of Appeals said:

> "In our judgment this claim should have been presented to the executor defendant for allowance before this action was instituted.
>
> "If then it is necessary to present such claim for allowance, we approach the next question. Is it necessary to allege in the petition on a claim against an estate that such claim has been presented to the executor for allowance? It is our view that such allegation is necessary and that a failure to so plead makes the petition bad on demurrer as not stating facts sufficient to constitute a cause of action."

In the face of these Ohio decisions construing Ohio statutes, the Circuit Court of Appeals refused to dismiss the bill of complaint in this case which contained none of the allegations essential to state a cause of action against the representatives of estates of deceased shareholders.

That such matters as this are to be exclusively governed by the law of the State is conclusively shown by the recent decision of this Court in the case of *Pufahl, Rec'r*, v. *Estate of Parks*, — U. S. —, 81 L. Ed. 73, in which it was held that

a demand by the receiver of an insolvent national bank against its stockholders for an assessment of statutory double liability, while based on a Federal statute, may be enforced only in conformity to the law of the forum governing the recovery of debts of like nature.

It is of the utmost importance that this Court exercise its discretionary power to review and correct this decision of the Circuit Court of Appeals which so clearly conflicts with the statutes of Ohio and the construction placed thereon by the courts of Ohio. The purpose of the legislature and Courts of Ohio to promote the prompt settlement of decedents' estates is seriously handicapped and hindered by the decision complained of herein.

No argument is here made with respect to the remaining points hereinabove specified as errors. They are, however, believed to be serious errors, and should a writ of certiorari issue pursuant to this petition, counsel for the petitioners wish to have them considered by this Court in making a decision on the merits of this case.

In conclusion, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of Circuit Court of Appeals for the Sixth Circuit should be reversed; and that to such an end a writ of certiorari should be granted and this Court review the decision of the Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

WELLMORE B. TURNER,
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Dated at Dayton, Ohio, May 20th, 1937.

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## APPENDIX.

Sections of Ohio General Code pertinent to the presentation of claims against decedents' estates.

"§ 10509-112. Presentation, allowance and rejection of claims.—Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or reject all claims, except contingent claims, within thirty days after their presentation. Any claim presented after the time herein provided shall not prevail as against *bona fide* purchasers or as against executors and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against *bona fide* distributees. (R. S. § 6109; 38 v. 146, § 99; S. & C. 584; 102 v. 200; 114 v. 320, § 1.)".

"§ 10509-133. Action on rejected claim barred, when.—When a claim against the estate of a deceased person has been presented to the executor or administrator, and has been rejected by him in whole or in part, but not referred to referees, or if a claim has been allowed by the executor or administrator in whole or in part and thereafter rejected or further reduced by the court, the claimant or person deriving title from him, must commence an action thereon within two months after receipt of actual notice of such rejection or reduction, if the debt or any part of it be then due, or within two months after some part of it becomes due, or be forever barred from maintaining an action thereon; except that, in the event of the death, resignation or removal of such executor or administrator, within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor; and provided that no claimant shall be permitted to bring an independent action

on his claim after it has been heard and decided on the merits on exceptions to the schedule of debts filed by him.

"For the purposes of this section the action of a claimant shall be deemed to have been commenced when the petition and præcipe for service of summons on the executor or administrator have been duly filed. (R. S. § 6097; 38 v. 146, § 90; S. & C. 582; 114 v. 320 (431); 116 v. 385 (400), § 1. Eff. Sept. 2, 1935.)"

"§ 10509-134. Reinstatement of barred claim.—Upon petition filed by a creditor or person deriving title from him, whose claim has not been presented within the time prescribed by law, the probate court, if after notice to all interested parties and hearing, it is of the opinion that justice and equity so require, and that the petitioner is not chargeable with culpable neglect in failing to present his claim within the time so prescribed, may permit petitioner to file his claim for allowance, but such allowance shall not affect any payment or distribution made before the filing of such claim, nor shall it prejudice the rights of creditors whose claims were filed within the time prescribed by law. (114 v. 320, § 1.)"

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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# No. 108

---

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

---

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

## No. 108

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**REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS.**

Further illustrating the conflict between decisions of different United States Circuit Courts of Appeals, petitioners call the Court's attention to the case of *Hall* v. *Ballard*, decided by the Circuit Court of Appeals for the Fourth Circuit on June 14, 1937, and reported in 90 F. (2d) 939.

In that case certain creditors of the Peoples National Bank, of Abingdon, Virginia, filed a creditors' bill in equity in the United States District Court for the Western District of Virginia, under the Act of June 30, 1876, C. 156, Section 2, 19 Stat. 63, 12 U. S. C., Section 65 (set out in appendix of this brief), against said bank and its shareholders to enforce the personal liability of said shareholders. Judgment was entered therein in favor of the complaining creditors against

the Bank, adjudging the shareholders of the Bank to be liable to the extent of $100.00 for each share owned by them, appointing a receiver and giving judgment in his favor as such receiver for the benefit of said creditors against each of the shareholders who had been served with process in the action, and making an assessment against such of the other shareholders as were not served with process in the action who were non-residents of the State of Virginia, and directing the receiver to collect enough money to discharge the judgments and costs of the proceedings from the shareholders not to exceed $100.00 for each share owned. Thereafter the receiver Hall brought an action at law in the United States District Court for the Southern District of West Virginia, against Ballard, a resident of that district, to collect the assessment on ten shares of said bank stock owned by him. Ballard filed, among others, the plea of the statute of limitations of the State of West Virginia. The District Court sustained this plea and dismissed the action and the receiver carried an appeal to the Circuit Court of Appeals for the Fourth Circuit. This statement of the facts makes apparent immediately the similarity of this case to the case at bar. Both involve the question of the proper procedure for collecting a 100% assessment of liability on bank stock previously made by a court of equity in another State against a shareholder not served with process in the action in which the assessment was made, and the question of the extraterritorial effect of a decree making such an assessment. It is to be noted that the Hall case involves an assessment of liability on national bank stock and the appointment of a receiver to collect the same by a court of equity, and not by the Comptroller of the Currency, under Sections 191 and 192, 12 U. S. C.

On consideration of the question of the extraterritorial effect of the original decree of assessment in the District Court for the Western District of Virginia, the Circuit

Court of Appeals for the Fourth Circuit, on page 946, cited with approval a case which held,

> "* * * that the non-resident stockholders of the national bank were not necessary parties to the action by the creditors under the statute (12 U. S. C. A. § 65) to determine the liability of the bank and necessity for assessment upon the stockholders upon the theory that the individual liability of the stockholders under the statute imposing the same (12 U. S. C. A. § 64) was but a guarantee to the creditors of the bank that their claims would be paid to the extent of stockholders' stock at a par value on the conditions that assets of the bank proved to be insufficient to pay its liabilities and in such a suit the decree of the United States District Court ascertaining the amount of the bank's liability and necessity for assessment upon stockholders was binding on non-resident stockholders, though they had no notice of such proceedings, upon the theory that the stockholders were integral parts of the bank and were represented by the bank in all proceedings to which the bank was a party and that an action against the non-resident stockholders to enforce the liability of such stockholders which had been determined in the original action by the creditors under the statute (12 U. S. C. A. § 65) may be brought in any jurisdiction where service may be had on such stockholders."

Counsel for the petitioners submit that the foregoing quotation shows a clear conflict between this decision and the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Holmberg et al.* v. *Carr*, 86 F. (2d) 727, in which the Court, in referring to an assessment of double liability on the stock of a joint stock land bank previously made by a District Court in Minnesota, says, at page 730:

> "Therefore we hold that the assessment in the district court has no extraterritorial effect, and that the bill should have been dismissed."

The decision of the Circuit Court of Appeals for the Fourth Circuit in *Hall* v. *Ballard, supra,* is also in conflict with the decisions of several other Circuit Courts of Appeals on the question of how and by whom an assessment of liability on bank stock previously made should be collected from a non-resident stockholder not served with process in the action in which the assessment was made. In the *Hall* case the court approved the collection of the assessment by the receiver in an action at law, saying at page 946:

> "Furthermore a court of equity has the power to appoint a receiver and authorize him to enforce stockholders' liability in actions at law. Appellant followed the procedure approved by that decision."

The decree of the District Court in Chicago, upon which the case at bar is predicated, authorized the receiver there appointed "to collect from any or all of the stockholders of said Bank the assessments hereby levied against such stockholders, whether such stockholders be parties to this suit or not, and whether such stockholders be residents of Illinois, or reside elsewhere" (R. 43). The case of *Brusselback et al.* v. *Cago Corporation et al.,* 85 F. (2d) 20, decided by the Circuit Court of Appeals for the Second Circuit, was predicated upon the same decree of the Chicago Court, set out above. The similarity of that decree to the decree of assessment involved in the *Hall* case, *supra,* is apparent. On consideration of the question of how and by whom the assessment should be collected, the Court in the *Cago* case held that an assessment so made could only be collected from shareholders in other States in actions in equity by creditors of said bank for the benefit of all of such creditors. This case was cited with approval by the Circuit Court of Appeals for the Sixth Circuit in arriving at the same conclusion in the case at bar (R. 89). The rationale of both of these decisions is that since no provision is made in the Farm Loan Act for the collection

of the assessment by a duly constituted representative of all of the creditors, the collection must be made in an equity action by some of the creditors acting for the benefit of all; and the Court distinguishes certain cases holding that an action at law may be brough to collect a 100 per cent assessment of liability on stock of a national bank on the grounds that under the National Banking Act the stockholders' liability is enforceable by a receiver, appointed by the Comptroller of the Currency. See page 23 of the decision in the *Cago* case. There a conflict between the decisions in the *Cago* case and the *Hall* case arises, for in the latter case the assessment was not one made by the Comptroller of the Currency and collectible by statute by a receiver, but rather was an assessment made by an equity court under 12 U. S. C., Section 65, which, like the Farm Loan Act, makes no provision as to how or by whom an assessment once made is to be collected. The *Hall* case holds that such an assessment made by an equity court may be collected by a receiver and in an action at law; the *Cago* case holds that it can be collected only by creditors and only in an action in equity.

Counsel for petitioners submit that the foregoing analysis shows a clear conflict in the decisions of the Second, Sixth and Fourth Circuit Courts of Appeals both as to the extraterritorial effect of a decree of assessment on double liability bank stock, and as to the manner in which such an assessment should be collected. The decision in the *Hall* case has added to the confusion which already existed with respect to the questions involved, and a situation is presented which calls for a determination of those questions by this Court.

The argument set forth by counsel for respondents under Point II in their brief is based upon such a misapprehension of the facts and of the record in the courts below that petitioners feel obliged to answer it. The defendants

in the District Court and the appellants in the Circuit Court of Appeals never argued or contended that the assessment made in the primary equity suit in the Federal District Court at Chicago was conclusive upon shareholders, non-resident of Illinois and who were not before the Court. The plaintiffs in their bill in equity in the District Court in this case pleaded, however, the assessment made in the Chicago suit previously brought by them and alleged that such assessment was conclusive and binding upon all shareholders, without regard to residence or service of process. The motions to dismiss filed by various defendants have the same effect as demurrers, and the arguments in support thereof do not, therefore, estop the defendants and the petitioners in this Court in any respect. The defendants simply contended that if the assessments made in the previous equity suit were conclusive and binding upon non-resident shareholders, not served with process and not before the Court, as the plaintiffs alleged in their own bill in this suit, such assessments were collectible only by action at law.

No argument of this kind was made, or even suggested by opposite counsel in either the District or Appellate Court, and such a statement here seems to us improper and prejudicial to petitioners.

With respect to the statement made by counsel for respondents under Point III of their brief that the Supreme Court of Ohio has held adversely to our contentions relating to the probate laws of Ohio, we simply wish to point out that the case relied upon by counsel for respondents, namely, *State ex rel. Fulton, Supt. of Banks,* v. *Bremer,* 130 O. S. 227, was decided on December 5, 1935, whereas the case relied upon by us, namely, *Beach, Rec'r,* v. *Miener, Ex'r,* 131 O. S. 481, was decided on July 15, 1936. That part of the opinion in the *Bremer* case which is quoted in the respondents' brief is clearly *dicta,* and is not mentioned in the syllabus of the opinion, which in Ohio constitutes

the law of the case. That portion of the opinion in the *Beach* case which is quoted in our original brief is clearly in point to establish the proposition contended for, to wit, that under the probate laws of the State of Ohio a petition against the executor of an estate which does not allege a presentation of the claim to the executor within four months of the date of appointment or later upon leave first obtained from the probate court does not state facts sufficient to constitute a good cause of action.

Respectfully submitted,

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## APPENDIX.

Section 65, Title 12, U. S. C.: "When any national banking association shall have gone into liquidation under the provisions of section 181 of this title, the individual liability of the shareholders provided for by section 63 of this title may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. (June 30, 1876, c. 156, § 2, 19 Stat. 63.)"

---

### Affidavit of Service.

STATE OF OHIO,
*County of Montgomery, ss:*

Robert E. Cowden, being first duly sworn, says that he served a copy of the foregoing Reply Brief upon George R. Murray, one of the Solicitors for Respondents herein, by handing the same to E. P. Legler, his partner, (said George R. Murray being absent from his office and residence) on September 29, 1937; and that he also mailed a copy of such Reply Brief to J. Arthur Miller, one of the Solicitors for Respondents herein, addressed to him at 33 North LaSalle Street, Chicago, Illinois, by registered mail, postage prepaid, on September 29, 1937.

ROBERT E. COWDEN.

Sworn to before me by the said Robert E. Cowden and by him subscribed in my presence this 29th day of September, 1937.

[SEAL.]

LUDWICA RATERMAN,
*Notary Public in and for Montgomery County, Ohio.*

My Commission Expires August 2, 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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# No. 108

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ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

---

## BRIEF FOR PETITIONERS.

---

ROY G. FITZGERALD,
WELLMORE B. TURNER,
ROBERT E. COWDEN,
HOWARD P. WILLIAMSON,
*Counsel for Petitioners.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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# No. 108

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ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

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## BRIEF FOR PETITIONERS.

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### I.

### Opinions of the Courts Below.

The District Court for the Southern District of Ohio, Western Division, did not deliver an opinion. The judgment entered in that Court appears at page 61 of the Record of this case.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, to which an appeal was taken, was delivered on December 15, 1936, and is reported in 87 F. (2d) 761. It appears on page 74 of the Record.

## II.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 939, 28 U. S. C. A. § 347.

The decree of the Circuit Court of Appeals for the Sixth Circuit was entered December 15, 1936 (R. 73). A petition for rehearing was filed January 12, 1937, within the time provided by the rules of said Circuit Court of Appeals (R. 79). The petition for rehearing was denied March 9, 1937 (R. 79). A petition for writ of certiorari to said Circuit Court of Appeals was filed in this Court on June 2, 1937, within the time provided therefor. The petition was granted by this Court on October 11, 1937.

## III.

### Statement of the Case.

Respondents, as creditors of The Chicago Joint Stock Land Bank, filed a bill in equity in Ohio to collect the double liability assessment against the shareholders of that bank.

The respondents' bill of complaint recites (R. 4) that in October, 1932, a class suit in equity to establish the double liability of the shareholders of The Chicago Joint Stock Land Bank was instituted in the United States District Court for the Northern District of Illinois, at Chicago; that in that bill there were named as defendants The Chicago Joint Stock Land Bank and all of its shareholders, exceeding one thousand in number; that service was had on all shareholders residing in Illinois who could be found; that no service was attempted upon non-resident shareholders, and none of the Ohio shareholders was served, appeared, or defended.

The bill further alleges that the matter was referred to a master, and that his report, which was adopted by the

Court, found that the bank was insolvent to the extent of approximately twelve million dollars ($12,000,000) and recommended that an assessment of one hundred per cent (100%) should be levied against all shareholders (R. 5); that this levy was made by the Chicago decree (R. 28), dated August 5, 1935.

Subsequently, on August 8, 1935, respondents instituted this present action in the District Court in the Southern District of Ohio against all shareholders resident in Ohio to collect the assessments theretofore determined and levied in the Chicago decree. Their bill of complaint further alleges (R. 5) that said Chicago decree is effective and binding on all the shareholders of the Bank, wherever residing, and whether of record or otherwise, and that it effectively adjudicates against the defendants named in such bill of complaint that all of the shareholders of the Bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent (100%) of the par value of the shares held by them.

No allegation as to the insolvency of the Bank or the necessity of making an assessment against its shareholders was contained in the bill, nor was the Bank made a party, in Ohio.

Petitioners filed a large number of motions to dismiss upon various grounds which may be classified for the purpose of convenience into three principal issues:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity; and

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either at law or in equity; and

3. The bill of complaint does not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00).

The District Court dismissed the bill of complaint (R. 61) on the following grounds:

1. That said bill, as amended, is insufficient to constitute a valid cause of action in equity;

2. That the matter in controversy does not exceed, exclusive of costs and interest, the sum or value of three thousand dollars ($3,000.00); and

3. Upon the grounds raised by all other motions.

Thereafter, the complainants, failing to amend their bill of complaint and treating the decree of the District Court as final, appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 61, *et seq.*). That court reversed the decree of said District Court and remanded the case to said District Court (R. 73). It is this decree of reversal which is now before this Court for review.

## IV.

## Specification of Errors.

The Circuit Court of Appeals erred in refusing to affirm the decree of the District Court dismissing the bill of complaint, on the grounds that:

1. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or necessity for the assessment.

2. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, against those defendants who are representatives of estates of deceased shareholders, for the reason that said bill does not allege the presentation of the claims for the assessment to such representatives, as required by the General Code of Ohio.

3. The bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action in equity for the following reasons:

a. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.

b. There is no trust fund involved.

c. This is not a true class suit.

d. A class suit is unnecessary in this case.

e. Multiplicity of suits is not alone sufficient basis for equity jurisdiction, and never by plaintiffs.

4. The bill of complaint, as amended, does not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00), for the following reasons:

a. Andrew J. Christopher owns but seven (7) shares of stock and many of the defendants own less than thirty-one (31) shares, alleged by complainants to have a par value of one hundred dollars ($100.00).

b. The defendants who own more than thirty (30) shares of stock each cannot be sued *in this action* for more than their proportionate liability *to these complainants*, which in every instance is less than Three Thousand Dollars ($3,000.00), even when calculated on the basis of a par value of one hundred dollars ($100.00) per share.

5. The bill of complaint, as amended, exhibits on its face a misjoinder of defendants, and a misjoinder of causes of action.

6. The bill of complaint, as amended, exhibits on its face a defect of parties plaintiff.

## V.

## ARGUMENT.

### Point A.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege the facts necessary to establish the insolvency of the Bank and the necessity for the assessment, and relied merely upon the decree of the District Court in Chicago as to those elements.**

It is the position of counsel for petitioners that the bill of complaint in this case does not state facts sufficient to constitute a good cause of action in that it fails to allege the facts necessary to establish the insolvency of the Bank and the necessity for the assessment. The bill relies upon the decree of the District Court in Chicago as establishing those elements. Following is the allegation upon which the respondents rely (R. 5):

> "10. Plaintiffs are advised, and therefore allege, that the above mentioned decree of the United States District Court for the Northern District of Illinois is effective and binding not only upon the Illinois stockholders who were served with process in such cause, but is equally effective and binding upon all of the stockholders of the Bank, wherever residing, and whether of record or otherwise, insofar as such decree determines and fixes the necessity and extent of the assessments for which the stockholders of such Bank are liable. So it is that such decree effectively adjudicates against the defendants herein that all of the stockholders of the Bank are liable to the creditors of the Bank for an assessment equal to one hundred per cent of the par value of the shares held by them, respectively."

The bill contains no allegation as to the insolvency of the Bank, the extent of any such insolvency, the necessity for assessment of statutory double liability on the Bank stock, or the amount of such assessment.

In support of our contention that such allegations are essential and that respondents are not entitled to rely upon the decree of the Chicago court as establishing those elements which support the assessment sought to be collected in this suit, we call the Court's attention first to the case of *Holmberg et al.* v. *Carr*, 86 F. (2d) 727, decided by the Circuit Court of Appeals for the Second Circuit on December 7, 1936. In that case it was held that an assessment levied by a United States District Court in Minnesota on the shareholders of a Minnesota joint stock land bank is without extraterritorial effect, requiring dismissal of a bill filed by creditors in a Federal court in New York against New York shareholders, where the bill does not allege the facts underlying the liability for the assessment. At page 729, the court said:

> "The bill at bar, as drafted, depends altogether upon what was done in the district court of Minnesota; it does not allege the facts upon which the liability depends, but only their adjudication by that court; hence it can depend only upon the conclusiveness of the assessment there found."

As to the conclusiveness of that assessment, the court said, at page 730:

> "Therefore we hold that the assessment in the district court has no extraterritorial effect, and that the bill should have been dismissed."

In their brief in opposition to our petition for writ of certiorari, the respondents cite the case of *Brusselback et al.* v. *Cago Corporation et al.*, 85 F. (2d) 20, in support of the sufficiency of their bill of complaint in the instant

case. This was a case brought in the District Court in New York City by Brusselback and others (the same complainants in the instant case) to collect from New York shareholders the same assessment sought to be collected in the present case from Ohio shareholders. Respondents assert that the cases are identical, and would have us believe that the bills of complaint were substantially the same. It is quite true that in both bills of complaint it was alleged that the decree of the Chicago court is binding on non-resident shareholders and effectively adjudicates against them the liability for the assessment. But there is in fact a vital difference between the two bills of complaint, in that the bill in the *Cago* case contains in addition the allegations as to the facts underlying the liability for the assessment, which we claim were improperly omitted from the bill in the instant case. Paragraph 26 of the bill in the *Cago* case reads as follows:

> "26. The debts and liabilities of said Chicago Joint Stock Land Bank exceed its assets in the amount of approximately Twelve Million Dollars ($12,000,000.00) and the defendants therefore are justly indebted to and there is due and owing from each of the defendants to the creditors of the Chicago Joint Stock Land Bank, including the complainants, an amount equal to the full par value of the stock owned by each of the defendants as aforesaid, which amount appears opposite the names of said defendants in Exhibit 'A'."

No similar allegation is contained in the bill of complaint in the case at bar, and it is this omission to allege these facts underlying the liability for the assessment which makes the bill fatally defective. That this important difference in the pleadings was recognized and considered by the Second Circuit Court of Appeals, is clearly shown by the following quotation from the opinion in the *Carr* case, *supra:*

> "Therefore we hold that the assessment in the district court of Minnesota has no extraterritorial effect

and that the bill should have been dismissed. The plaintiffs may have leave to plead over, if they wish; it is not perfectly clear what they meant in the following allegation of the first article of the bill regarding the Minnesota bill: 'the allegations of which bill of complaint are hereby repeated and adopted as though the same were fully incorporated and set forth herein.' Whether this was intended to allege a straight cause of action against the shareholders under Brusselback *v.* Cago Corp., *supra,* independently of anything done in limine, or whether it was only scrivener's redundancy, we cannot tell; we give the pleading the benefit of the doubt. On the amendment, if any, all reference to the Minnesota suit should be omitted; and there will be no receiver appointed, ancillary or other."

Thus it clearly appears that the Second Circuit Court of Appeals recognized the necessity for the allegations as to the facts upon which the liability for the assessment must be based, and both the *Cago* and the *Carr* cases are authority for our contention that the bill in the case at bar is defective for want of these essential allegations.

Never having been served with process in the suit in the District Court in Chicago, the Ohio shareholders will be deprived of their right to defend the matters relating to the insolvency of the Bank and the amount of the assessment if the present bill of complaint is allowed to stand. The position of these shareholders is clearly stated by the Court in its opinion in the *Carr* case, at page 729:

"Here, however, we are concerned with a federal statute, which not only gives no express power to any official to levy an assessment, but which (Wheeler *v.* Greene, *supra,*) seems to us to interpret as requiring the assessment to be made afresh in the suit against the shareholder. The language we refer to is on page 51 of 280 U. S., 50 S. Ct. 21, 74 L. Ed. 160. 'There is not the same need that the stockholder's liability should be summarily disposed of behind his back * * * rather

than by the usual proceeding of a bill in equity which is brought in the neighborhood, in which the stockholder can be heard, and by which the assessment instead of one hundred percent. can be adjusted to the specific case.' We should think that that applied as well to judicial assessments as to others."

When the *Cago* and *Carr* cases are tried on the merits, the New York shareholders will have the opportunity to defend the allegations as to the insolvency of the Bank and the amount of the assessment, while if the bill in the case at bar is permitted to stand, the Ohio shareholders will be foreclosed as to those elements, which were, in the words of Mr. Justice Holmes in *Wheeler* v. *Greene, supra*, summarily disposed of behind their backs.

There remains to be considered one further point with respect to the question of the extraterritorial effect of the decree of the Chicago court. In their brief in opposition to our petition for certiorari in this case, respondents stated that in support of the various motions to dismiss the bill in the District Court the defendants argued that the one hundred per cent (100%) assessment made in the Chicago suit was conclusive as to them and that suits to collect the assessment would have to be brought at law, and not in equity; and that having made such an argument below, petitioners are now estopped from asserting that the Chicago decree is without extraterritorial effect. No such argument was made by the defendants below in support of the motions to dismiss. The defendants simply contended, as they now contend here, that if the assessment previously made in the Chicago court is conclusive and binding on non-resident shareholders not served with process and not before the Chicago court, as alleged in the bill of complaint, such an assessment is collectible only by action at law. The motions to dismiss filed by various defendants have the same effect as demurrers, and the arguments in support thereof do not,

therefore, estop the defendants, as petitioners in this Court, in any respect.

POINT B.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as to those defendants who represent estates of deceased shareholders, on the grounds that the bill did not state facts sufficient to constitute a good cause of action, in that it failed to allege presentation of the claims to such representatives, as required by the statutes and decisions of the State of Ohio.**

The bill of complaint names among the defendants twelve decedents (R. 1, 2; 12 to 18, incl.). These decedents were also named as defendants (but, of course, not served with process) in the primary suit by these same plaintiffs in the District Court in Chicago.

The amendment to the bill of complaint here alleges that these twelve defendants were dead (R. 13), and that they all died prior to the entry of the Chicago decree of August 5, 1935 (R. 12 to 18, incl.). It thus appears of record that all the decedent defendants named in this Ohio suit were deceased prior to the time of filing this bill.

The bill, as amended, fails to allege the presentation of claims based on the assessments to the representatives of the estates of the deceased shareholders, prior to suing on the claims, as required by Ohio General Code, Sections 10509-112, 10509-133, and 10509-134 (set out in the Appendix herein).

These Ohio statutes require creditors of an estate to present their claims first to the executor or administrator for allowance or rejection within four months after his appointment, whether due or not due; and if the claim is disputed or rejected, to file suit then against the executor or adminis-

trator within two months thereafter, or within two months after the claim becomes due, or be forever barred.

In *State ex rel. Fulton, Supt. of Banks* v. *Bremer, Adm.*, 130 Ohio St. 227, a claim for super-added liability on bank stock was presented by the state superintendent of banks to the administratrix of a deceased stockholder, and was rejected. The superintendent did not commence suit for recovery against the administratrix within the two months fixed by law. He was held to be forever barred, under Section 10509-33, Ohio General Code.

Construing these Ohio statutes in the recent case of *Beach, Rec'r* v. *Mizner, Ex'r*, 131 Ohio St. 481, the Supreme Court of Ohio held that a petition against the executor of an estate which did not allege a presentation of the claim to the executor as required in these statutes did not state facts sufficient to constitute a good cause of action. In its opinion the court states the question presented to it as follows, at page 483:

> "The defendant contends that the plaintiff's petition is demurrable because it does not allege that the claim was presented to him as executor within four months after his appointment, as provided by Section 10509-112, General Code (114 Ohio Laws, 320), and contains no allegation to the effect that the plaintiff obtained leave from the Probate Court to file his claim for allowance, as provided by Section 10509-134 (114 Ohio Laws, 320)."

The Supreme Court of Ohio decides the question thus presented as follows, at page 487:

> "Since the plaintiff failed to allege that his claim was presented within four months or later upon leave first obtained from the Probate Court, the judgment of the Court of Appeals (which sustained the demurrer) must be affirmed."

The same construction of these statutes was given by an Ohio Court of Appeals in the unreported case of *Holmberg*

*et al.* v. *Third National Bank & Trust Company, Executor, et al.* (motion to certify overruled by Ohio Supreme Court December 16, 1936), which was a suit brought at law against the executor of a deceased shareholder of the Southern Minnesota Joint Stock Land Bank to collect the assessment hereinbefore referred to in connection with *Holmberg et al.* v. *Carr*, 86 F. (2d) 727. The Ohio Court of Appeals said:

> "We do not believe that the District Court of Minnesota, by action designating a receiver to proceed to collect this liability on behalf of the creditors, can invest that receiver with rights under the Ohio law which the creditors for whom he acts did not already possess. In other words, the procedural steps, which the receiver must take in the Ohio courts, can be no less than those which are required of the same creditors whose interests he represents. In our judgment this claim should have been presented to the executor defendant for allowance before this action was instituted.
>
> "If then it is necessary to present such claim for allowance, we approach the next question. Is it necessary to allege in the petition on a claim against an estate that such claim has been presented to the executor for allowance? It is our view that such allegation is necessary and that a failure to so plead makes the petition bad on demurrer as not stating facts sufficient to constitute a cause of action."

That such matters as this are to be governed exclusively by the law of the State is conclusively shown by the recent decision of this Court in the case of *Pufahl, Rec'r*, v. *Estate of Parks*, — U. S. —, 81 L. Ed. 73, in which it was held that a demand by the receiver of an insolvent national bank against its stockholders for an assessment of statutory double liability, while based on a Federal statute, may be enforced only in conformity with the law of the forum governing the recovery of debts of like nature.

There is no reason why these creditors suing in equity to enforce a statutory liability should be exempted from the

conditions prescribed by Ohio law as conditions precedent to filing suit against personal representatives of Ohio shareholders; and it is perfectly clear under the Ohio authorities cited above that they have not so complied with those conditions.

In their brief in opposition to our petition for writ of certiorari, respondents quoted a part of the opinion in the case of *State ex rel. Fulton, Supt. of Banks* v. *Bremer, supra.* The part so quoted is clearly *dicta* and is not mentioned in the syllabus of the opinion, which in Ohio constitutes the law of the case. The *Beach* case, relied upon by petitioners, was decided after the *Bremer* case, and is directly in point.

POINT C.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to constitute a good cause of action in equity for the following reasons:**

**1. This is a secondary suit to collect a one hundred per cent (100%) assessment heretofore made by the decree of the Chicago court, for which the remedy at law is full and adequate.**

It is the position of counsel for petitioners that the decree of the Chicago court has no extraterritorial effect, and is not binding upon these Ohio shareholders who were neither served with process in that suit, nor appeared or defended therein. Assuming, however, that such decree were effective and binding on these Ohio shareholders, it is clear that this action was not properly brought in equity. The complainants in this suit do not seek a determination of the insolvency of the Chicago Joint Stock Land Bank, nor do they seek to fix the liability of the shareholders of that Bank, nor to levy an assessment therefor. Their bill avers

that these matters have already been determined in the suit in the Chicago court, and that an assessment of one hundred per cent (100%) was levied upon all shareholders of the Bank.

Complainants' bill further avers that this decree in Chicago levying the assessment is binding upon the Ohio shareholders and that they cannot contest either the insolvency of the bank nor the amount of the assessment, nor the necessity therefor (R. 5). This suit in Ohio is merely one to collect the assessment heretofore assessed and levied by the Chicago decree.

In such an action to collect a shareholder's double liability assessment, theretofore fixed and levied, any remedy is at law. Such legal remedy is held to be adequate, full and complete, and equitable relief is uniformly denied.

*Kennedy* v. *Gibson,* 8 Wall. 498;
*Casey* v. *Galli,* 94 U. S. 673;
*Mills* v. *Scott,* 99 U. S. 25;
*U. S.* v. *Knox,* 102 U. S. 422;
*Bushnell* v. *Leland,* 164 U. S. 684, 685;
*Lantry* v. *Wallace,* 182 U. S. 546, at 548;
*Studebaker* v. *Perry,* 184 U. S. 258, 263, 264;
*Hale* v. *Allinson,* 188 U. S. 56, 78, to 81;
*Kelley* v. *Gill,* 245 U. S. 117;
*Shriver* v. *Woodbine Bank,* 286 U. S. 467, 478, 479;
*Auer* v. *Lombard* (C. C. A. 1), 72 Fed. 209;
*Tompkins* v. *Craig,* 93 Fed. 885;
*Carey v. McMillan* (C. C. A. 8), 289 Fed. 380;
*Aufdenkamp* v. *L'Herrison* (C. C. A. 9; 1932), 56 F. (2d) 344, 345;
*Broderick* v. *American General Corp.* (C. C. A. 4; 1934), 71 F. (2d) 864, 867.

The leading case for the proposition that the liability of the stockholder, where the complainant seeks the full amount of the liability, is at law, and not in equity, is

*Kennedy* v. *Gibson,* 8 Wall. 498.

This was an action commenced by the receiver of a national banking association appointed by the comptroller of the currency to recover the sum of $200,000, being the par value of the 2,000 shares of stock held by the defendants. The bill averred that it would be necessary for the payment of the liabilities of the bank to obtain from its stockholders an amount of money equal to the full amount of the stock so issued. It alleged that it was necessary to have an accounting and concluded with a prayer for an accounting and for a decree directing the defendants to pay their pro rata share of such balance of debts of the bank as might remain. The court, however, held, at page 505:

> "The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. *Where the whole amount is sought to be recovered the proceeding must be at law.* Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted." (Italics ours.)

In *Casey* v. *Galli,* 94 U. S. 673, another action by the receiver of a national bank to enforce the liability of the defendant as a stockholder, the court, in disposing of the objection that the action was commenced at law and should have been begun in equity, said, at page 677:

> "In regard to the first three of these objections, it is sufficient to say that Kennedy *v.* Gibson is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the comp-

troller, that his determination cannot be controverted by the stockholders in suits against them; *and that, when the order is to collect the full amount of the par of the stock, the suit must be at law.*" (Italics ours.)

In *Hale* v. *Allinson,* 102 Fed. 790, affirmed 106 Fed. 258, affirmed 188 U. S. 56, the Circuit Court, whose opinion was adopted by the Circuit Court of Appeals, in discussing the right to maintain an action in equity, said, at page 794:

> "*Where the whole amount is sued for, there seems to be nothing further for equity to do.* No account needs to be taken, no ascertainment of liability is to be had. Nothing is to be done, except to enforce a separate individual contract for an undivided sum. *For such enforcement the legal remedy is adequate,* even if the standard be applied that 'it is not enough that there is a remedy at law. It must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'" (Italics ours.)

In the recent case of *Carey* v. *McMillan,* 289 Fed. 380, 386, the Circuit Court of Appeals for the Eighth Circuit said:

> "Furthermore, where the full amount unpaid is sought, the suit must be at law."

In determining the question of whether this suit was properly brought in equity it is necessary to distinguish between double liability suits such as *Pollard* v. *Bailey,* 87 U. S. 520, and *Wheeler* v. *Greene,* 280 U. S. 49, 50 S. Ct. 71, 74 L. Ed. 160, on one hand, where the determination of the necessity for and the fixing and levying of the assessment are the principal matters involved, and such cases as *Casey* v. *Galli,* and *Hale* v. *Allinson, supra,* on the other hand, where the collection of the assessments, theretofore levied either by judicial or administrative authority, is sought.

In the former class of cases the suit is necessarily in equity because the flexible forms of relief in a suit in equity,

such as interventions, accounts, contributions and assessments, are essential elements. In the latter class of cases the action is to recover a fixed amount theretofore assessed against each shareholder and is necessarily at law because in actions solely for money judgment the legal relief is adequate and complete. The assessment involved in the present action provides a perfect example of this distinction and of the necessity for preserving the same. The original suit in the Chicago court was a primary suit against the bank and its shareholders to determine the insolvency of the bank, to fix the amount of the assessment and levy the same. The case at bar is a secondary suit solely to collect the assessment so made in the Chicago suit. In their brief in the Court below, respondents relied heavily upon the so-called *Conway* cases to support the jurisdiction of equity.

*Conway* v. *Owensboro Bank*, 165 Fed. 822;
*Conway* v. *Owensboro Bank*, 185 Fed. 950;
*Alsop* v. *Conway*, 188 Fed. 568;
*Robertson* v. *Conway*, 188 Fed. 579;
*Alsop* v. *Conway*, 223 U. S. 720 (certiorari denied).

These are all primary cases, and as such are clearly distinguishable from the case at bar. They are comparable to the *Chicago* case which, like the *Conway* cases, was an action to assess, collect and distribute the statutory liability.

The *Conway* cases, as the Sixth Circuit Court pointed out in 188 Fed. 568, at 576, are distinguishable from and not governed by *Hale* v. *Allinson*. The Circuit Court said:

> "We find nothing in Hale *v.* Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, opposed to the views we have expressed for there the suit was merely to *recover, by suit in Pennsylvania,* the liability of stockholders of a Minnesota corporation *whose affairs were being administered in a suit instituted in that state.* There was plainly no reason why separate suits should not have

been brought against each stockholder, *and at law.*" (Italics ours.)

The case at bar, likewise, is distinguished from the *Conway* cases.

In *Conway* v. *Owensboro Bank*, 165 Fed. 822, 826, Judge Evans observed:

> "So that, while we think the demurrers should all be overruled, we do not mean to say that upon proper application the court would not direct the liability of stockholders to be determined *and enforced by actions at law to be brought by its receiver. We do not pass upon that phase of the case now, because it has not been presented.* What we hold is that the 'double liability' constitutes a trust fund for creditors which it is competent for this court to administer in a suit in equity, and that in order to do this effectually, the fund would have to be brought into court. We further think that in its discretion the court might pursue either the course of enforcing the liability in this suit, or by directions to its receiver, cause him to sue each or any of the stockholders in separate actions in any court having jurisdiction of such actions. We think this indicates the proper practice, and that it is supported by the authorities. Terry *v.* Little, 101 U. S. 216 * * *." (Italics ours.)

Had the *Conway* cases solely involved collecting assessments theretofore made from non-resident stockholders residing outside of the originating court's jurisdiction by means of ancillary or supplementary actions in those other jurisdictions, then such subsequent actions would of necessity have been brought at law.

Judge Evans points out—and so did the Sixth Circuit in reviewing *Alsop* v. *Conway*, 188 Fed. 568—that that question was not preser ed on the record there, and that the court was not passing on that question.

The *Conway* cases, therefore, do not hold, as respondents contend they do, that a subsequent and independent action

to collect in a jurisdiction other than that administering the trust fund, must be in equity and not at law.

We submit that it is immaterial whether the assessments provided for in the Federal Farm Loan Act (12 U. S. C. A. 812) be made by a court of equity, as directed in *Wheeler* v. *Greene*, or whether they be made by an administrative officer of the Government, such as the comptroller of the currency under the National Banking Act, 12 U. S. C. A. 65, as in *Casey* v. *Galli*, 94 U. S. 673, or the superintendent of banks under the New York Banking Act, as in *Broderick* v. *American General Corporation* (C. C. A. 4), 71 F. (2d) 864, 867.

*The important query is not how were the assessments made; but have the assessments been made?*

Such assessment, once made in the manner provided by law (whether by an administrative officer or by a court of equity) is collectible, as any other fixed obligation, in an action at law.

In other words, the function of a court of equity in levying an assessment under the Federal Farm Loan Act, is to establish an equal and ratable assessment because the statute does not empower a receiver of the bank or an administrative officer of the Government to do so. This is fully illustrated by the decision in *Wheeler* v. *Greene*.

The United States District Court, sitting at Chicago, according to the express allegations of the complainants' bill, has made that equal and ratable assessment against the shareholders of the Chicago Joint Stock Land Bank, leaving nothing further to be done than to collect that assessment so levied from each individual shareholder by subsequent proceedings at law.

That the plaintiffs below gratuitously pray for equitable relief such as the appointment of a receiver in the Southern District of Ohio and for an adjudication of how the funds shall be divided among the plaintiffs, does not change the legal character of this litigation. There is no averment

in the bill which warrants such a prayer and the court under such circumstances will look to the main relief sought, namely, the recovery of a money judgment, in determining the nature of the action. Collateral and gratuitous averments of an equitable character will be disregarded.

The Supreme Court said in *Buzard* v. *Houston*, 119 U. S. at page 351:

> "The effect of the provision of the Judiciary Act, as often stated by this court, is that 'whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law *because the defendant has a constitutional right to a trial by jury.*' (Citing cases.) In a very recent case, the court said: 'This enactment certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule and to impress it upon the attention of the courts.' New York Guaranty Co. *v.* Memphis Water Co., 107 U. S. 205, 214." (Italics ours.)

This has always been, and is today, the law.

*Wood* v. *Philips*, 50 F. (2d) 714, at page 717, citing with approval the language of Mr. Justice Field in *Whitehead* v. *Shattuck*, 138 U. S. 146;

*Broderick* v. *American General Corporation et al.* (C. C. A. 4), 71 F. (2d) 864.

At page 870, in the case last cited, the court, after discussing the statute above mentioned and the Seventh Amendment to the Constitution said:

> "Whatever may be said in other jurisdictions as to the superior advantage of trying a number of actions at law as one suit in equity because some common question of law or fact is involved, there is little to be said in its favor in the federal courts where the presence of such common question may furnish ground for consideration, so that even at law only one trial of the

common question will be required. * * * *And where to the lack of substantial advantage is added the constitutional requirement of trial by jury in actions at law, the argument against equity jurisdiction, merely because there are a number of plaintiffs and defendants and a common question of law or fact, is conclusive.* It must be manifest that an action at law does not lose its character as such because another action at law exists in favor of the same plaintiff or against the same defendant; for the character of an action is determined by the question which it involves, not by the fact that other actions involve the same questions. *It would be absurd to say that a suit against one stockholder to enforce his statutory liability is at law with the right of jury trial guaranteed, but that, if by chance the persons with whom he is in no way connected are also liable, he may be sued with them in equity and a jury trial denied him.* The guarantees of the Constitution are substantial rights of the citizen which may not be thus *whistled away* for reasons of supposed convenience." (Italics ours.)

*U. S.* v. *Bitterroot Co.*, 220 U. S. 451, 472 (1905);
*Aufdenkamp* v. *L'Herrison* (C. C. A. 9); 56 F. (2d) 344, 346.

It follows that a bill in equity such as the respondents here seek to maintain is improper and was properly dismissed.

**2. This is not a true class suit.**

The adjudicated cases demonstrate that in order to maintain a class suit there must be a common fund. This element is not present in this case.

*Bickford's, Inc.*, v. *Fed. Reserve Bank*, 5 Fed. Supp. 875;
*Mountain Lbr. Co.* v. *Davis* (C. C. A. 2), 11 F. (2d) 219, certiorari denied 271 U. S. 674;
*Yeaton et al.* v. *Lenox et al.*, 33 U. S. 123;
*Hale* v. *Allinson*, 188 U. S. 56, at 79-80;
*Bouton* v. *Van Buren*, 229 N. Y. 17.

The correct rule is well stated in 28 U. S. C. A., Sec. 721-723, page 143, note 283, as follows:

> "Suits brought by or against numerous defendants are of two types. In the first type which is that of the true class suit, it will be found that the subject matter of the suit is a fund or property over which the court can and does acquire an effective jurisdiction by the joining of some persons as plaintiffs or defendants who may be considered representative of all those who are interested in the same fund or property. * * * In the other types of cases, spurious class suits, the suit is not concerned with a fund or property at all but with a personal liability."

This is clearly an action to recover on the personal and several liabilities of the various defendant shareholders and, as such, is not a true class suit.

**3. A class suit is unnecessary.**

Full, adequate and complete relief is available on the law side of the court in a case of this type. In their brief in the lower court respondents contended that this action must necessarily be in equity "because class suits at law are unknown." This conclusion is based upon a false premise because, although class suits are unknown at law, it does not follow that this is a class suit which must be in equity.

In the first place the right and obligation created by the statute is several, and not joint, and the right to enforce the same is at law.

12 U. S. C. A., Section 812;
*Richmond* v. *Irons*, 121 U. S. 27, 30 L. Ed. 864;
*United States* v. *Knox*, 120 U. S. 422, 26 L. Ed. 216;
*Kennedy* v. *Gibson*, 8 Wall. (U. S.) 498, 19 L. Ed. 476;
*Flash* v. *Conn.*, 109 U. S. 371;
*Tompkins* v. *Craig*, 93 Fed. 885.
*Broderick* v. *American General Corp. et al.*, 71 F. (2d) 864.

Secondly, there is no common fund to be administered:

*Bouton* v. *Van Buren,* 229 N. Y. 17, *supra.*

Furthermore, under the Conformity Act (28 U. S. C. A. 724), the provisions of Ohio General Code, Sec. 11257, permitting one or more to sue or defend for the benefit of all when the question is one of a common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, are applicable in the federal courts in an action at law.

That is to say, in the case at bar, any bondholder or other creditor could intervene in any action that might be brought at law on behalf of all creditors and upon proving his cause of action would receive a judgment for a proportion of the stockholders' liability to which he may be entitled.

This procedure is not the procedure of a class suit in equity, but is a statutory procedure which has been held by the Ohio courts to apply to actions at law.

*Platt* v. *Colvin,* 50 Ohio St. 702, 712, 713.

For a similar New York case, construing a similar New York statute (Sec. 195, N. Y. Civ. Pr. Act), see *Atkins* v. *Trowbridge,* 162 App. Div. 629.

The Federal courts have similarly construed similar statutes of other States.

*Stearns Coal Co.* v. *Van Winkle* (C. C. A. 6), 221 Fed. 590; cer. denied 241 U. S. 670;

*Perry* v. *Central Coal & Coke Co.* (C. C. A. 8), 138 Fed. 769;

*Cherry* v. *Howell,* 4 Fed. Supp. 597, 599, affirmed (C. C. A. 2), 66 F. (2d) 713.

From the foregoing it will be seen that there is not the slightest difficulty in ascertaining the fractional portion of the total stockholders' liability to which each creditor intervening in the action would be entitled. He can receive

as much in an action at law as he can possibly receive in an action in equity, and under these circumstances equity will not intervene because some bondholder or creditor may not see fit to intervene for the protection of his specific rights.

The legal remedy is, therefore, full and adequate and the mere fact that the plaintiffs choose to denominate their action a bill in equity when in fact it is a petition at law, cannot change the essential character of the petition.

**4. There is no trust fund involved.**

Assets of an insolvent corporation do not constitute a trust fund for the benefit of creditors for the purpose of creating equitable jurisdiction.

*Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, at 383;

*Wood* v. *Nat. City Bk.* (C. C. A. 2), 24 F. (2d) 661, at 662;

*Jones* v. *Mutual Fidelity Co.*, 123 Fed. 506.

It is also clear that stockholders' liability which has been expressly declared by the Supreme Court (*Wheeler* v. *Greene*, 280 U. S. 49) not to be an asset of the corporation, does not constitute a trust fund.

*Broderick* v. *American General Corp et al.* (C. C. A. 4), 71 F. (2d), 864.

The decree of the Chicago court, on which this action is based, provided in paragraph 12 (R. 39):

> "the court reserves jurisdiction as to all questions which may arise * * * concerning the application and distribution of moneys collected by the receiver herein and concerning the settlement of the account of the receiver, his discharge and the amount to be allowed the receiver and counsel for plaintiffs; and also concerning the compromise by the receiver herein of doubtful claims, or of claims against stockholders who are of doubtful solvency."

Thus the District Court, at Chicago, has first obtained jurisdiction over the *res, i. e.*, the trust fund, and has expressly reserved the right to administer and distribute additions to it. Under the respondents' theory there would be trust funds all over the country, each being administered separately *in violation of the very decree in Chicago which they procured.*

Plaintiffs in this *Ohio* case were plaintiffs in the *Chicago* case, and are bound by their decree ordering the District Court at Chicago to administer the fund which their action at Dayton seeks to collect from Ohio shareholders. The doctrine of comity prevents two courts from attempting to administer the same fund:

21 *C. J.* 41, 42.

The plaintiffs contend further that equitable jurisdiction is necessary because the distribution of the fund hoped to be obtained by judgment against these defendants requires it.

But, it has been held that a lawsuit brought for the purpose of creating a fund does not require the aid of equity in distributing the fund subsequently realized from judgments so to be obtained.

*Bouton* v. *Van Buren*, 299 N. Y. 17.

This is so because of the established practice, not only in Ohio but elsewhere, that a several judgment may be rendered in a law action so as to give to each plaintiff his proportionate part of the whole amount recovered.

Ohio General Code, Section 11583;

Ohio General Code, Section 11420-19;

*United Mine Workers of America* v. *Coronado Coal Co.* (C. C. A. 8), 258 Fed. 829, at 832-833; affirmed 259 U. S., 344, 383;

*Kansas City Southern Ry.* v. *Leslie*, 238 U. S. 599, 603;

*Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U. S. 173, 176;

*Walsh Construction Co.* v. *Cleveland,* 16 Ohio L. R. 62, 66, 67 (N. Dist. of Ohio).

**5. Multiplicity of suits alone is not sufficient basis for equity jurisdiction.**

In the lower courts plaintiffs urged the avoidance of a multitude of suits as a justification for seeking the exercise of the equitable powers of the court through a bill in equity. It is axiomatic that a multitude of suits is no ground for equitable relief under these circumstances.

*Hale* v. *Allinson,* 102 Fed. 790, at 791 (affd. 188 U. S. 56);

*Equitable Life Assurance Soc.* v. *Brown,* 213 U. S. 25, 51;

*Boise Artesian Water Co.* v. *Boise City,* 213 U. S. 276, 286.

It is only when there is a multiplicity of actions between the same parties growing out of a single transaction or based upon a single contract in which there are to be a large number of separate recoveries between the same parties, that equity intervenes for the purpose of diminishing the number of actions.

In the recent case of *Matthews* v. *Rodgers,* 284 U. S. 521, at p. 530, the Supreme Court said:

> "In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits *between the same parties, involving the same issues of law or fact.* It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party *are not* necessarily identical." (Citing

authorities, including *Kelley* v. *Gill*, *Hale* v. *Allinson*, and Pomeroy Eq. Jur., 4th Ed., Secs. 251, 251½, 255, 259, 268.)

It is interesting to note that the court also held in the above case (p. 524) that want of equity jurisdiction by reason of the existence of an adequate remedy at law, if obvious, may and should be objected to by the court of its own motion.

As was pointed out in *Hale* v. *Allinson*, 188 U. S. 56, even the existence of a multiplicity of suits is not sufficient to sustain a bill in equity, in a case of this kind.

Said the court, at pages 77-80:

> "The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff.
>
> • • • 'If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these became liable, if at all, by reason of a contract entered into by himself alone with the making of which his co-defendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability.'
>
> • • • We therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits."

This case is a complete answer to the arguments advanced by the plaintiffs that an action in equity is neces-

sary to save a large number of actions against these defendants. See also:

*Kelly* v. *Gill*, 245 U. S. 117;
*Broderick* v. *American General Corp. et al.* (C. C. A. 4), 71 F. (2d) 864;
*Carey* v. *McMillan* (C. C. A. 8), 289 Fed. 380;
*Fidelity Trust & Safe Dep. Co.* v. *Archer* (C. C. A. 3), 179 Fed. 32;
*Tompkins* v. *Craig*, 93 Fed. 885;
*Buchanan* v. *Adkins* (C. C. A. 4), 175 Fed. 692, 701.

POINT D.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill did not state facts sufficient to show the required jurisdictional amount of in excess of three thousand dollars ($3,000.00), for the following reasons:**

**1. Many of the defendants own less than thirty-one (31) shares of stock, alleged in the bill of complaint to have a par value of one hundred dollars ($100.00).**

Over one hundred of the defendant shareholders own less than thirty-one shares of the stock in question. Motions to dismiss were filed on behalf of some of these defendants on the grounds that as to them sufficient facts were not alleged in the bill of complaint to show the required jurisdictional amount in controversy. The liability of the defendants is individual and several. This is not only so by the terms of the statute (12 U. S. C. A., Sec. 812) which provides that each shareholder shall be liable "equally and ratably, and not one for another," and again by the terms of the Chicago decree upon which this suit is based, but also by reason of the fact that each defendant has the right to set up his own individual defense because of the fact that

his liability arises out of a separate and independent contract having no privity with any other contract. The stockholders' liability arises by virtue of his stock subscription agreement or his ownership of the stock in which contract the double liability provisions of Section 812, *supra*, form a part.

It is thus quite clear under any method of calculation that no shareholder who owns less than thirty-one (31) shares of the stock alleged to have a par value of $100 per share, can be sued in a Federal district court for his double liability. The District Court below was clearly right in dismissing the bill of complaint as to such defendants.

**2. The defendants who own more than thirty (30) shares of stock each cannot be sued in this action for more than their proportionate liability to these complainants, which in every instance is less than $3,000.00, even when calculated on the basis of a par value of $100.00 per share.**

It is the position of counsel for petitioners that neither the plaintiffs' claims nor defendants' liabilities may be aggregated to confer jurisdiction upon the Federal court. The fact that there are a large number of plaintiffs who own a large number of bonds and that they or some of them are seeking to recover in the Federal court from stockholders of the Chicago Joint Stock Land Bank the amount of their assessment, does not permit the amount of the bonds to be taken as the criterion of jurisdictional amount.

The jurisdiction is fixed by the amount of the several liabilities, separately and individually, and not by the amount of the total liabilities or the total claims. This is because the actions are several, the liabilities are several and the contracts are several. The plaintiffs are not suing for the amount of their bonds, but for the amount of the assessment against the stockholders severally.

No individual defendant, therefore, could be required to respond to a plaintiff for more than the amount claimable against him. It follows that the jurisdictional amount is fixed by the amount of each defendant's liability and not by the combined amount, either of the plaintiffs' claims or of the defendants' liabilities.

*Chatfield* v. *Boyle,* 105 U. S. 231;
*Schwed* v. *Smith,* 106 U. S. 188, 190;
*Rogers* v. *Henepin County,* 239 U. S. 621, at 622;
*Scott* v. *Frazier,* 253 U. S. 243, at 244;
*Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, at 85;
*Bullard* v. *Cisco,* 290 U. S. 179;
*Everhard* v. *Northwestern Mut. Life Ins. Co.* (C. C. A. 6), 241 Fed. 353;
*Cohn* v. *City Service Co.* (C. C. A. 2), 45 F. (2d) 687, 689;
*Aufdenkamp* v. *L'Herrison,* 56 F. (2d) 344, 345;
*Broderick* v. *American General Corp.* (C. C. A. 4), 71 F. (2d) 864.

Plaintiffs allege they own $132,000 of bonds out of a total of more than $42,000,000 of bonds issued by the bank (R. 3-4).

The claims of the plaintiffs are separate and several, and for jurisdictional purposes cannot be aggregated; but, even when aggregated for the purpose of this argument, they are limited to $\frac{132,000}{42,000,000}$ part of the total liability of each defendant. Even if the amounts claimed from all defendants are aggregated (which we do not concede may be done), the above fractional part of the alleged total liability to these plaintiffs is only $1,422.59, which is computed on the basis of $\frac{132,000}{42,000,000}$ part of $458,900, the latter figure being the total amount of the attempted recovery from all

defendants herein in behalf of all creditors of the bank (R. 7-11).

Since it has been repeatedly held by the Federal courts that the amount in controversy is limited to the amount that any one plaintiff would be entitled to receive for himself, it necessarily follows that no single defendant is liable to any one plaintiff, for an amount in excess of three thousand dollars ($3,000.00). Even if both claims and liabilities be aggregated, as pointed out above, the jurisdictional amount is wahting.

*Terry* v. *Bank of Commerce*, 93 U. S. 44;
*Chatfield* v. *Boyle*, 105 U. S. 231;
*Walter et al.* v. *Northeastern R. R. Co.*, 147 U. S. 370;
*Wheless* v. *St. Louis*, 180 U. S. 379, at 382;
*Title Guaranty & Surety Co.* v. *State of Idaho, Etc.*, 240 U. S. 136;
*Robbins* v. *Western Auto Ins. Co.* (C. C. A. 7), 4 F. (2d) 249, certiorari denied 268 U. S. 698;
*Pinkston* v. *B. of L. F.* (C. C. A. 6), 69 F. (2d) 600, affirmed 293 U. S. 96;
*Auer* v. *Lombard* (C. C. A. 1), 72 Fed. 209;
*Smithson* v. *Hubbell*, 81 Fed. 593;
*Risley* v. *City of Utica et al.*, 168 Fed. 737, at 747;
*Everhard* v. *Northwestern Mut. Life Ins. Co.* (C. C. A. 6), 241 Fed. 353;
*Elliott* v. *Empire Natural Gas Co.* (C. C. A. 8), 4 F. (2d) 493;
*Woods* v. *Thompson* (C. C. A. 7), 14 F. (2d) 951;
*First Nat. Bank of Woodbine et al.* v. *Harrison Co., Iowa* (C. C. A. 8), 57 F. (2d) 56, at 57.

We call attention particularly to the fact that several of the cases cited above were suits in equity, where the claims of the plaintiffs were that a trust fund was involved, in which a number of claimants had interests, so that even

if the amended bill in this case could be held to state a good cause in equity, yet it was properly dismissed for lack of jurisdictional amount. This rule applies in equity as well as at law.

In the Circuit Court, plaintiffs relied upon *Brusselback et al.* v. *Cago Corporation et al.*, 85 F. (2d) 20, and *Robertson* v. *Conway*, 188 Fed. 579, as supporting their claim that the required jurisdictional amount is in controversy.

Each of those cases is distinguishable from the instant case. In the *Cago* case the jurisdictional amount was $\frac{132,000}{42,000,000}$ part of $1,189,600, which is $3,738.74; whereas in the case at bar the jurisdictional amount, on the same basis of calculation, is $\frac{132,000}{42,000,000}$ part of only $458,900, which is but $1,422.59. Our method of computation of the jurisdictional amount was not presented in the *Cago* case, probably for the obvious reason that the fund sought to be recovered ($1,189,600) would clearly bring the fractional part belonging to the plaintiffs to an amount in excess of $3,000, as above explained.

*Robertson* v. *Conway*, is not in point for at least two reasons.

First, the case was what we have heretofore called a "primary" suit, to take an accounting of all the assets and liabilities of the bank and to make and levy the assessment, and then, incidentally, to collect the assessment. This important feature is stated by the court on page 583 of 188 Fed., as follows:

> "Under the bill in question there were thus necessarily involved certain fundamental questions common to all stockholders, viz., the amount, if anything, by which the debts of the bank exceeded its assets, and the amount of the outstanding stock."

None of those facts is present in this Ohio litigation.

Second, the part of the fund which the complainants in the *Conway* case claimed for themselves exceeded the then jurisdictional amount of $2,000 (page 584). That is not true in the case at bar.

**3. The par value of the shares of stock of the Bank is fixed by statute at five dollars ($5.00) per share.**

The act known as the Federal Farm Loan Act, passed in 1916, to provide "capital for agricultural development, to create standard forms of investment based upon farm mortgage," etc., created both "Federal Land Banks" and "Joint Stock Land Banks". They were emanations, at the same time, of one general purpose. They had a number of features in common. Both were put under the administration of the Federal Farm Loan Board. Both were capable of being financial agents of the Government. Both were for carrying on the business of issuing and selling farm loan bonds and investing funds in farm first mortgages. The clauses of the act covering the organization of Federal Land Banks are embodied in Sections 671 to 697, inclusive, Title 12, U. S. C. A. Among them is Section 692, reading as follows:

> "The capital stock of each Federal land bank shall be divided into shares of $5 each, and may be subscribed for and held by any individual, firm, or corporation, or by the government of any state or of the United States."

The provisions of the act covering the organization of Joint Stock Land Banks are embodied in Sections 811 to 822, inclusive. Among them are Sections 811, 812, 813, and 815, as follows:

> SEC. 811. "• • • They shall be organized subject to the requirements and under the conditions set forth

in Sections 671-683 of this chapter, so far as the same may be applicable. * * *"

SEC. 812. "* * * Shareholders * * * shall be held individually responsible, equally and ratably, and not one for another, * * * to the extent of the amount of stock owned by them at the par value thereof, * * *"

SEC. 813. "Except as otherwise provided, joint-stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on, Federal land banks by this chapter, so far as such restrictions and conditions are applicable: Provided, however, that the Government of the United States shall not purchase or subscribe for any of the capital stock of any such bank; and each shareholder of any such bank shall have the same voting privileges as holders of shares in national banking associations."

SEC. 815. "No joint stock land bank shall be authorized to do business until capital stock to the amount of at least $250,000 has been subscribed, one-half thereof paid in cash and the balance subject to call by the board of directors, and a charter has been issued to it by the Federal Farm Loan Board."

The above are practically all the provisions concerning stock of the Joint Stock Land Banks, until we come to Section 961, *et seq.*, covering insolvency and liquidation of banks and associations under said act, when the same clause covers both Federal Land Bank and Joint Stock Land Banks:

SEC. 963. "Upon default of any obligation, Federal land banks and joint stock land banks may be declared insolvent and placed in the hands of a receiver by the Federal Farm Loan Board, and proceedings shall thereupon be had in accordance with the provisions of this section regarding national farm loan associations."

It will be noticed that the act under subtitle "Capital Stock of Federal Land Banks" (Sections 691 to 697, in-

clusive) provides specifically for (1) minimum amount of capital before beginning business, (2) how times and conditions of payment of subscriptions may be prescribed, (3) division into $5 shares, (4) how they may be subscribed for and held, i. e., whether by individual, firm, or corporation, (5) transferability, (6) dividends, (7) voting of stock. But under the sub-title "Joint Stock Land Banks" (Sections 811, *et seq.*, above quoted) aside from the specific cross-reference to "powers", "restrictions and conditions" imposed on Federal Land Banks, no provision is specifically made thereunder for division into shares or par value of shares, or who may subscribe for and hold stock, transferability, dividends. Only on those points which differentiate Joint Stock Land Banks' powers, restrictions, and conditions from Federal Land Banks, is express provision made; thus (1) minimum amount of capital is changed from $750,000 to $250,000; (2) the Government of the United States is allowed to subscribe for and hold stock in Federal Land Banks but is forbidden to hold it in Joint Stock Land Banks; (3) instead of one vote per share if held by National Farm Loan Associations or by the Government, and non-voting by other shareholders, as in the case of Federal Farm Loan Banks, the shareholders in Joint Stock Land Banks have the same voting privileges as in national banks.

The conclusion from the premises is, that on all matters *not specifically differentiated*, Joint Stock Land Bank stock has the same *powers, restrictions and conditions* as Federal Land Bank stock. And among these matters *not specifically differentiated* is the matter of par value of stock. Since the Federal Land Bank stock is expressly required to be $5 per share, and no provision whatever is found for Joint Stock Land Bank stock other than in the general provision that these banks "shall have the powers of and be subject to all the restrictions and conditions imposed on, Federal land banks", the reasonable conclusion is that Con-

gress meant the shares of these banks also to be in denominations of $5 par. *Otherwise the statute would be entirely silent as to what stock a Joint Stock Land Bank might issue.*

This conclusion is strengthened by the fact that the stock of national farm loan associations, provided for in the same act, is also set at $5. (Sec. 731.)

It is further strengthened by the fact that subsequent legislation of 1923, providing for the creation of Federal Intermediate Credit Banks, to be subject also to the Federal Farm Loan Board in much the same way as Federal Land Banks and Joint Stock Land Banks, expressly fixed the capital stock of those banks at $5 per share (Title 12, Sec. 1061, U. S. C. A.)

No apparent reason exists why Joint Stock Land Bank shares should have been intended to be an exception to the general rule, and the law is settled that a corporation has no power to issue stock of a kind not expressly authorized by the statute under which it is created.

Our claim therefore is, that the par value of Joint Stock Land Bank shares having been fixed by statute at $5, the double liability created by Section 812 must be calculated on that basis, instead of $100.

This question seems to have engaged the attention of but one judge, viz., Patterson, District Judge, Southern District of New York, and in but one case: *Todd* v. *Russell,* 1 F. Supp. 788. His decision was adverse to what we here contend for, but was rendered we think upon insufficient consideration of the Federal Farm Loan Act and upon hasty conclusion. He says (page 789):

> "There is nothing in the Federal Farm Loan Act or in any other statute that expressly limits the par value of joint stock land banks to $5 a share. The defendant's contention is built upon 12 U. S. C. A., Sec. 692, to the effect that the par value of Federal Land Banks' shares shall be $5 each, and upon Sec. 813 to the effect that the joint stock land banks 'shall have the same power of, and

be subject to all the restrictions and conditions imposed on, Federal Land Banks by this chapter, so far as such restrictions and conditions are applicable.' But the latter section quite clearly refers to the general powers and restrictions on these banks and not to the internal structure of the two kinds of banks. Section 781 is entitled 'Powers of Federal Lank Banks Generally', and Section 791 is entitled 'Restrictions on Federal Land Banks'. These are the sections made operative generally to joint stock land banks, and neither of them deals with par value of stock. There is no limitation in the law on the par value of stock in joint stock land banks, and this defense is invalid."

The reasoning of the learned judge would be more convincing were it not the apparent fixed policy of Congress, in creating banks of any sort, to prescribe (and in law necessary that it prescribe) the par value of their stock. Thus, besides the Federal Land Banks, and Federal Intermediate Credits Banks above mentioned, the National Banks (Title 12, Sec. 287) have their shares fixed at $100 par value. Unless some good reason be apparent why an exception was intended in the case of Joint Stock Land Banks, these should be held to be governed by the plain meaning of the words of Section 813.

The language of said section: "shall have *the powers of* and be subject to *all the restrictions and conditions imposed on,* Federal Land Banks," cannot fairly be construed as referring only "to the *general* powers and restrictions on these banks and *not to the internal structure.*" If Congress had meant this language to refer only to Sections 781 as to powers generally and 791 as to restrictions, it could easily have said so. We have a right to assume it would have said so, had it not intended a broader scope.

A glance at the text of the two Sections 692 and 813 strengthens the view that Congress was considering the "internal structure" when using the language in question. In Section 813 it adds the proviso: "that the Government of

the United States shall not purchase or subscribe for any of the capital stock" of Joint Stock Land Banks. Now, in Section 692 of the clause fixing shares of land banks at $5 each, adds: "and may be subscribed for and held by • • • the government of any state or of the United States." Clearly, then, *it was this very Section 692, and a differentiation regarding that particular feature of it, that was under consideration in Section 813.*

Section 813 further provides that each shareholder in Joint Stock Land Banks shall have the same voting privileges as stockholders in national banks. But the voting privileges of stock in Federal Land Banks are provided for in Section 694, almost immediately following 692. Again, this is a matter of "internal structure", and a clear indication that Congress was considering 692 and its context with regard to capital stock, rather than those more remote sections preferred by District Judge Patterson.

It may be argued however that although the statute prescribed $5 as the par value, nevertheless the shares were issued in denominations of $100, and the subscribers are estopped from now claiming the statutory limitation, of which they are presumed to have had knowledge. To this it is a sufficient answer that the United States courts have consistently held the measure of powers of national banks to be their statutory grant, and powers not conferred by Congress are denied them.

See *Texas & Pac. Ry. Co.* v. *Pottorff*, 291 U. S. 245, affirming 63 F. (2d) 1.

In that case the U. S. Supreme Court held further:

> Syl. 6. "No rights arise on an ultra vires contract, even though contract has been performed, and such conclusion cannot be circumvented by erecting estoppel which would prevent challenging legality of power exercised."

See also:

*Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209;
*California Bank* v. *Kennedy*, 167 U. S. 362.

In this latter case a national bank had become a shareholder in a state savings bank. A creditor of the savings bank brought action in a California state court for a judgment against the savings bank for the amount of his deposit, and named as defendants also the national bank and others as stockholders, to collect their statutory liability under California law. The national bank set up its own want of authority to purchase stock in another corporation. The Supreme Court held this defense good as against an attempt to enforce the liability of a stockholder. Speaking through Justice White it said, page 366:

> "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers, except those expressly granted or which are incidental to carrying on the business for which they are established. Logan County Bank v. Townsend, 139 U. S. 67, 73. * * * It is clear however that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. First National Bank v. National Exchange Bank, 92 U. S. 122, 128."

And further along the opinion quotes *Central Trans. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60, as follows:

> " 'A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made

it, but that it could not make it. *The contract cannot be ratified by either party*, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This language was also cited and expressly proved in Jacksonville, etc., Ry. *v.* Hooper, 160 U. S. 514, 524, 530." (Italics ours.)

Still further Justice White says (page 371):

"As was said by this court in Union Pacific Railway *v.* Chicago, etc., Railway, 163 U. S. 564 (speaking through Mr. Chief Justice Fuller) p. 581:

"'A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel.'"

If the above principles, held good for national banks, are applicable to joint stock land banks, the Chicago Joint Stock Land Bank did not have the power to issue shares of its stock other than at a par value of $5, for no such power was expressly or by implication conferred upon it by the statutory law of its origin. There is no *implied power* in a corporation (which is a creature of a statute) to issue shares of stock of a kind not *expressly* authorized by that statute, *and any express authorization inserted in the charter purporting to give such authorization* is void:

*Laredo Imp. Co. v. Stevenson* (C. C. A. 8), 66 Fed. 633, at 635;

See also *Goodman* v. *Greathouse* (1923), 47 Nev. 198, holding that a corporation cannot issue stock both with and without par value where the statute does not expressly authorize it.

Any attempt by the bank to issue shares having a par value other than $5 per share was *ultra vires*. Being

beyond the powers conferred upon the corporation by Congress, it was wholly void in that respect at least. No performance on either side could give it validity "or be the foundation of any right of action upon it". It "cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

If neither the corporation nor the stockholder can give validity to such an *ultra vires* feature of the stock, it necessarily follows that a creditor cannot do so for the purpose of enforcing the statutory liability, and the Federal courts have so held:

> *Scoville* v. *Thayer,* 105 U. S. 143; *Winters* v. *Armstrong,* 37 Fed. 508; *Laredo Imp. Co.* v. *Stevenson* (C. C. A. 8), 66 Fed. 633.

In the case last cited the Circuit Court of Appeals, in holding *void* certain shares of stock issued without express statutory authorization (*although the charter had been amended so as to ostensibly authorize the shares in question*), said, on page 635:

> "Corporations created under statutory authority are the mere *creatures of the statute. Their powers are measured by the statute under which they have their existence.* Beyond the limits of the powers *there* granted, and those fairly incidental thereto, they can neither act nor agree to act. Corporations thus created have *no implied power* to change the amount of capital prescribed in their charters, and all *attempts* to do so, *not expressly authorized by the statutes* under which they exist, *are void.*" (Italics ours.)

In *Head and Amory* v. *Providence Ins. Co.,* 2 Cranch 127, the great Chief Justice said, at page 167:

> "Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and dis-

abilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be *precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.*

"*To this source of its being, then, we must recur to ascertain its powers,* and to determine whether it can complete a contract by such communications as are in this record." (Italics ours.)

One necessary result of holding the par value limited to $5 is to disqualify, on a further ground, plaintiffs' action for lack of jurisdictional amount involved. A defendant would have to hold more than 600 shares to have a total liability, even to all creditors, for an amount in excess of $3,000. None of these defendants does so, except the Western Securities Company. Even if the plaintiffs' contention that the aggregate of these claims should be regarded as a trust fund (to be collected *in futuro*) be sustained, and jurisdiction be thus based upon the aggregate, still they represent but $132,000 of the $42,000,000 bonds, as we show elsewhere in this brief, and they are limited therefore to a 132,000/42,000,000 part of that aggregate, which is far below the jurisdictional amount. As for the Western Securities Company and its 759 shares, plaintiffs name in their bill and amendment to bill four individual defendants "and other persons unknown" as the true holders individually of said 759 shares; and unless one of them be the holder of more than ¾ of the 759 shares, none of them can be said to be individually within the jurisdictional amount required on the showing of the pleadings. It is well settled that the jurisdictional amount must be clearly alleged by the plaintiff. It cannot be a matter of conjecture:

*Eberhard* v. *Northwestern Mut. Life Ins. Co.* (C. C. A. 6), 241 Fed. 353.

Attention is called to the fact that this suit is to collect a statutory liability, not a subscription to stock. A statutory liability cannot be enlarged.

On this question of interpretation of statutory provisions fixing the par value of shares and consequently the extent of double liability, the Court is respectfully reminded that these shareholders are something else than mere profit seekers. The joint stock land bank legislation occurred in July, 1916, in connection with a nationwide appeal by the National Administration to the patriotism of citizens. These investments were advertised and urged by the Government itself as a means of rehabilitating the agricultural interest. It pledged the utmost care for the protection of such investors. It is, therefore, not becoming in the judiciary department of the same government to go beyond the express wording of these statutes in an effort to enlarge by implication the additional liability. The disaster in which investors find themselves from having yielded too patriotically and confidently to the appeal of government is sufficiently great. Rather would it be in the spirit of fairness and justice to hold the double liability down to the express language of the statutes themselves.

## Point E.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint on the grounds that the bill on its face exhibits a misjoinder of defendants and a misjoinder of causes of action.**

Multifariousness exists not only because the liabilities of all defendants are distinct and separate and based upon distinct and individual contracts, but also because wholly distinct claims are joined to the money demand which forms the principal relief sought. There are 145 separate debtors who are sued together in this action as defendants with no

excuse therefor save that they are all stockholders of the Chicago bank, although their contracts of stock ownership are several, independent and distinct. In a case of this nature, as is clearly pointed out by the Supreme Court in *Hale* v. *Allinson*, 188 U. S. 56, at 78, "each defendant's defence may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defence, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another". See also Mr. Justice Peckham's quotation from the opinion of Judge McPherson on pages 79-80 of the report. And, as stated by the Circuit Court of Appeals in *Fidelity Trust and Safe Dep. Co.* v. *Archer* (C. C. A. 3), 179 Fed. 32, at 36, such a suit as this "while single in form, is but a conglomeration of suits for legal demands, involving different issues and different proofs and resulting in saving, if any, but little expense".

There is, therefore, no legal reason why these defendants should be joined; it is clear that they are improperly joined. *Tompkins* v. *Craig*, 93 Fed. 885, at 886; and authorities cited above.

POINT F.

**The Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint, on the grounds that the bill on its face exhibits a defect of parties plaintiff.**

The Chicago decree (R. 39) provides in paragraph 10 thereof:

> "That the receiver herein be and he hereby is authorized to collect from any or all of the stockholders of said bank the assessments * * * whether such stockholders be parties to this suit or not and whether

such stockholders be residents of Illinois or reside elsewhere: And upon payment in full of any such assessments to the receiver herein, such receiver is hereby authorized to give full discharge and acquittance to any stockholder thus making payment."

Some of the motions to dismiss were based in part on the ground that the receiver in the Chicago action, having thus been named and designated in the Chicago decree (in which the plaintiffs herein were also the plaintiffs therein) as the person to bring this action, these plaintiffs at least are bound by their own decree. These plaintiffs cannot rely on their own decree in part and repudiate it in part. They must accept the whole decree according to its terms so far as they themselves are concerned.

*Matter of Swales,* 60 App. Div., 599; affirmed 172 N. Y., 651;

*Matter of Morrison,* 52 Hun. 102, at 108; affirmed 117 N. Y., 638;

*Starbuck* v. *Starbuck,* 173 N. Y., 503.

The case of *Wheeler* v. *Greene* is to be distinguished from this case because here the plaintiffs to this action were also the plaintiffs in the Chicago action, in which former proceeding the Illinois District Court at the instance and request of these plaintiffs designated the receiver in that action as the person to enforce and collect the stockholders' double liability and thus these same plaintiffs are estopped from repudiating or impeaching their own decree.

## Conclusion.

The bill of complaint in this case is fatally defective because of the absence of allegations showing the facts supporting the liability of the Ohio shareholders. The decree of the Chicago court has no extra-territorial effect and cannot be depended upon to establish the insolvency of the Bank,

the necessity for the assessment and the extent of the assessment in an action to collect the assessment from shareholders who were not served with process and did not appear in the Chicago court. These non-resident shareholders cannot be deprived of their right to defend these essential elements by the mere allegation that the same have already been conclusively established.

The bill of complaint is likewise defective as to those defendants who represent estates of deceased shareholders because of the omission of allegations as to compliance with the probate laws of the State of Ohio. These complaining creditors suing in equity to enforce a statutory liability are not exempted from the requirements prescribed by Ohio law.

If it be assumed, however, that the decree of the Chicago court is effective and binding on these Ohio shareholders and does establish the liability for the 100% assessment, the action to collect this assessment was not properly brought in equity. It is nothing more than a suit on a money judgment. As surely as the original suit must be in equity, against both bank and stockholders, to make an accounting of the assets of the Bank and to determine and assess the liability, just so surely must subsequent proceedings to collect the assessment be at law.

The gratuitous prayer for equitable relief cannot be made a basis for equity jurisdiction. The main relief sought is recovery of a money judgment. That determines the nature of the proceeding. This is not a true class suit because there is no common fund to be administered. No fund of any kind can exist until the plaintiffs shall have obtained and collected judgments against these 145 separate alleged debtors on their separate liabilities. Furthermore, there is no necessity for a class suit here. Equity cannot be invoked in Ohio simply by alleging that the plaintiffs are suing on behalf of all creditors; because the Ohio General Code gives that privilege to plaintiffs at law as well.

Nor is the plaintiffs' resort to equity any better justified on the grounds that they have a great number of claims against separate and different defendants, even though the claims grew out of purchases of stock of the same corporation; no more than any merchant might bring one suit in equity to collect all his merchandise accounts. The defendants' constitutional right of jury trial is not thus to be "whistled away" to suit the convenience of the plaintiffs.

The required jurisdictional amount is not in controversy, because the proportional part of these two plaintiffs in whatever they collect for the creditors from the Ohio shareholders cannot be figured to exceed the sum of $3,000. If $5.00 be the true par value of the stock, no individual defendant is subject to the jurisdiction of a Federal court.

For these reasons, petitioners pray the Court for an order reversing the decree of the Circuit Court of Appeals for the Sixth Circuit, and affirming the decree of dismissal entered by the District Court for the Southern District of Ohio, Western Division.

Respectfully submitted,

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## APPENDIX.

Sections of Ohio General Code pertinent to the presentation of claims against decedents' estates.

"§ 10509-112. Presentation, allowance and rejection of claims.—Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or reject all claims, except contingent claims, within thirty days after their presentation. Any claim presented after the time herein provided shall not prevail as against bona fide purchasers or as against executor and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against bona fide distributees. (R. S. § 6109; 38 v. 146, § 99; S. & C. 584; 102 v. 200; 114 v. 320 § 1.)"

"§ 10509-133. Action on rejected claim barred, when.—When a claim against the estate of a deceased person has been presented to the executor or administrator, and has been rejected by him in whole or in part, but not referred to referees, or if a claim has been allowed by the executor or administrator in whole or in part and thereafter rejected or further reduced by the court, the claimant or person deriving title from him, must commence an action thereon within two months after receipt of actual notice of such rejection or reduction, if the debt or any part of it be then due, or within two months after some part of it becomes due, or be forever barred from maintaining an action thereon; except that, in the event of the death, resignation or removal of such executor or administrator, within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor; and provided that no claimant shall be permitted to bring an independent action on his claim after it has been heard and decided on the merits on exceptions to the schedule of debts filed by him.

"For the purposes of this section the action of a claimant shall be deemed to have been commenced when the petition and præcipe for service of summons on the executor or administrator have been duly filed. (R. S. § 6097; 38 v. 146, § 90; S. & C. 582; 114 v. 320 (431); 116 v. 385 (400), § 1. Eff. Sept. 2, 1935.)"

"§ 10509-134. Reinstatement of barred claim.—Upon petition filed by a creditor or person deriving title from him, whose claim has not been presented within the time prescribed by law, the probate court, if after notice to all interested parties and hearing, it is of the opinion that justice and equity so require, and that the petitioner is not chargeable with culpable neglect in failing to present his claim within the time so prescribed, may permit petitioner to file his claim for allowance, but such allowance shall not affect any payment or distribution made before the filing of such claim, nor shall it prejudice the rights of creditors whose claims were filed within the time prescribed by law. (114 v. 320, § 1.)"

"11257. When the question is one of a common or general interest of many persons, or the parties are very numerous, and is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. R. S. § 5008; 51 v. 57, § 37; S. & C. 957."

"11583. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. By the judgment, the court may determine the final rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled. R. S. 5311; 51 v. 57, § 371; S. & C. 1048."

"11420-19. When by the verdict either party is entitled to recover money from the adverse party, the jury must assess the amount of the recovery in its verdict. 114 v. 193 (211)."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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# No. 108

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ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.

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## REPLY BRIEF FOR PETITIONERS.

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Petitioners file this reply brief in order to clarify their position following the respondents' brief. The points made herein by the petitioners are outlined in the subject index, to which reference is here made.

### I.

**Is the Decree at Chicago Binding Upon Non-Resident Share-holders Who Neither Were Served Nor Entered Their Appearance Therein?**

Respondents aver in their Bill (R. 5) in the Ohio case that the Chicago decree

> "• • • effectively adjudicates against the Defendants herein that all of the stockholders of the Bank

> *are liable* to the creditors of the Bank for an assessment equal to 100% of the par value of the shares held by them respectively."

The decree does levy an assessment

> "upon all of the stockholders of the Chicago Joint Stock Land Bank and each and every one of them * * * in the amount of 100% of the par value of the stock so held by each stockholder on the 1st day of October, 1932" (R. 28).

The averment that the Chicago decree adjudicates the liability of the defendants herein is based upon the theory that all non-resident shareholders are bound by the Chicago decree through the doctrine of virtual representation. By the application of that doctrine, respondents seek to deprive petitioners of any hearing in Court upon questions vital to many and disastrous to others.

The doctrine of virtual representation applied to a corporation and its stockholders is of long standing. The true rule is that the corporation, when properly in Court, represents all of its shareholders in matters which directly affect the corporation and which indirectly affect the shareholders' equity therein. No finding of a Court can create a personal liability upon any person not within the jurisdiction of the Court. Respondents seek to make effective against non-resident shareholders the decree of the Chicago Court imposing a direct liability upon the shareholders as a class. The authorities extending the doctrine of virtual representation to such an instance are based upon the assumption that the shareholder at the time of making his contract agrees that such finding shall constitute liability upon him because of the provisions of the applicable Constitutions or Statutes of the States. See

*Bernheimer v. Converse*, 206 U. S. 516.

In the case at bar, the statutes of Illinois and of the United States are devoid of any provisions upon which an agreement to be bound may be attached to the shareholders.

Respondents' view is that the decree at Chicago is not a personal judgment against the shareholders individually. The Chicago decree is tantamount to a judgment against the shareholders as a class and attempts to create a personal liability upon the shareholders as a class and against each and every shareholder in that class. It is difficult by judicial refinement to distinguish a finding of personal liability of shareholders as a class, as well as against each and every individual of that class, and a personal judgment against the individuals, which leaves open only the question of whether or not the individual is a shareholder. The levying of an assessment is just as much an imposition of liability on the shareholders as a class as the levying of a tax or the imposition of a specific lien by the levying of execution. True, the liability imposed is not in the nature of a personal judgment against any named individual, but does impose the liability against each and every stockholder. The liability of the shareholders and each of them as a class is made absolute. Especially would the application of the doctrine of virtual representation be harsh in double liability cases, because the finding is that the stockholders are liable, not to the Bank, but to the creditors of the Bank, the payment of which liability does not directly affect the Bank. Surely, a fine thread upon which to hang the disregard of the rights of an individual to his day in court!

Some courts have refused to recognize such a star chamber proceeding.

*Lamar Ins. Co.* v. *Hildreth,* 55 Iowa 248;
*Converse* v. *Steward,* 94 N. Y. Sup. 310;
*Howorth* v. *Angle,* 162 N. Y. 179, 56 N. E. 489;
*Marshall* v. *Sherman,* 188 N. Y. 9, 24;
*Hunt* v. *Whewell,* 122 Wisc. 33;
*Leman* v. *MacLenan,* 7 O. C. C. (N. S.) 250 (Aff'd 75 O. S. 643);
*Converse* v. *Ætna Nat'l Bank,* 79 Conn. 163, 64 Atl. 340;
*Holmberg et al.* v. *Carr,* 86 F. (2d) 727.

The Supreme Court of the United States doubted, without deciding, the applicability of the doctrine.

*Hale* v. *Allinson*, 188 U. S. 56;
*Evans* v. *Nellis*, 187 U. S. 271.

See also *Yale Law Journal*, Vol. 17, Page 457, wherein this question is discussed. The author there commented:

> "Accordingly, the United States Supreme Court held in *Hale* v. *Allinson* that the proceedings were not binding upon any who were not served, or made voluntary appearance, and the statute thus proved abortive as to non-resident stockholders."

Respondents' brief, page 20, criticises petitioners because they contended in the District Court that the bill should be dismissed on the ground that the Chicago decree is not effective as against non-resident shareholders, and at the same time opposed an amendment which respondents were seeking to file below alleging insolvency. Our position in the District Court, the Court of Appeals and here is the same, to wit, the decree is not effective against non-resident shareholders; *but in the alternative*, should the Court hold the Chicago decree to be binding on the absentee shareholders, the bill should be dismissed for other reasons. The inconsistency, if there be one, is upon the respondents. They take no alternative position, but claim the Chicago decree is binding and at the same time offer an amendment pleading insolvency, which allegation they themselves contend is neither pertinent nor proper. We objected to the amendment for the reason that it was completely changing their cause of action.

There is no Act of Congress and no State constitutional or statutory provision imposing upon the shareholders of the Chicago Joint Stock Land Bank an agreement (which agreement is the basis for the application of the doctrine of virtual representation) to make the Chicago Court decree

binding upon non-resident shareholders who are not subject to the jurisdiction of that Court; in such case, the doctrine of virtual representation has no application and the bill should be dismissed for the following reasons:

1. There is no allegation in the Bill in Equity that the corporation is insolvent;

2. There is no allegation of the necessity of an assessment against shareholders;

3. The Bank is not a party to the proceedings in the case at bar.

## II.

**Petitioners are Being Unlawfully Deprived of Their Constitutional Right of Trial by Jury. The Action of the Respondents Should be at Law, Not in Equity.**

The above statement becomes necessary for consideration of the Court only in the event the Court should find the Chicago decree to be binding upon absentee stockholders. Petitioners cited a number of cases in their original brief sustaining this position. Respondents, however, contend that those cases are not applicable to the case at bar for two reasons: (1st) in those cases no trust fund was sought to be administered; and (2nd) none of those cases involved a class suit, which is cognizable in equity.

Mere administration of a trust fund does not generate equitable jurisdiction. To entitle respondents to maintain their suit in equity, the Court must be required necessarily to exercise some equitable power in the administration of the fund. A trust fund may be ordered paid over to either an individual or a class of individuals without the exercise of any equitable powers. This can be done on the law side of the Court.

No Equitable Administration of the Fund in the Case at Bar is Either Necessary or Proper in the Ohio Court.

The Court at Chicago has set up appropriate machinery for the equitable administration of all funds derived from the shareholders. It has thus assumed jurisdiction over the *res*. By its decree (R. 38), the receiver is required to publish notice once each week for four successive weeks in the Chicago Daily Law Bulletin

> "to the effect that *all* persons having claims as creditors of the Chicago Joint Stock Land Bank shall be permitted to file their intervening petitions in this proceeding * * * and to make proof of their claims before the Receiver herein, failing to do which, such creditors shall have no claim against the fund collected herein."

The Receiver (R. 39) was further

> "authorized to collect *from any or all of the stockholders* of said Bank the assessments hereby levied against such stockholders, whether such stockholders be parties to this suit or not, and whether such stockholders be residents of Illinois, or reside elsewhere. And upon payment in full of any such assessments to the Receiver herein, such Receiver is hereby authorized to give full discharge and acquittance to any stockholder thus making payment."

The decree further provides (R. 39):

> "12. It is further ordered, adjudged and decreed that the Court reserves jurisdiction as to all questions which may arise concerning the validity of claims filed herein by intervenors concerning the application and distribution of moneys collected by the Receiver herein * * *."

All funds recovered through the Federal Court in Ohio may be ordered transmitted to the Receiver in Chicago. This does not constitute equitable administration of a trust

fund. Respondents would have Federal District Courts in the forty-eight States and State courts in which actions were brought by creditors each equitably administering the fund, with a possible result of variable determinations in as many courts in which the actions may be brought. The facts necessary to determine the equal and ratable distribution to the creditors should be determined by one Court. Each creditor's proportion to the whole may be determined to be different in each proceeding. The enormous expense to the creditors and the stockholders to have such separate and distinct administrations of the fund in many Districts and the necessity for the creditors to file their claims in every jurisdiction would be burdensome, to say the least. The congeries of diverse decisions which may result could easily be obviated by the mere mailing of checks to the receiver at Chicago. Under these circumstances, the Ohio Court should not assume an equitable administration of that fund, but should transmit the same upon recovery.

The sound discretion of the Ohio Court has been exercised against the administration of this fund (R. 61). Such sound discretion should not be disturbed upon respondents' desire to have a separate administration of that part of the fund collected in Ohio.

These respondents were the complainants in the Chicago case. (Reply Brief of the Respondents, Page 2.) Certainly, these respondents should not be permitted in this Court to deny their own Chicago decree.

Respondents contend, however, that the bill in equity should be entertained for the further reason that this is a class suit, that class suits were cognizable in the English courts of Chancery prior to 1789 and therefore recognized by the Federal courts. As stated in our Original Brief, *Section 11257 of the General Code of Ohio* permits class suits to be brought on the law side of the Court.

*Platt* v. *Colvin*, 50 O. S. 702, 712, 713.

*The Conformity Section of the Federal Statutes* (*Section 724 of Title 28, U. S. C. A.*) permits in the Southern District of Ohio such an action to be brought on the law side of the Court. *Section 384 of Title 28, U. S. C. A.* denies to the Federal Court equitable jurisdiction where there is a plain, adequate and complete remedy at law.

Respondents invoke the general rule that State Statutes can not enlarge or diminish the equity jurisdiction of the Federal Court in such cases wherein the equity court had such equitable jurisdiction prior to 1789. This rule has no application to the case at bar. Double liability on stockholders of Joint Stock Land Banks was not in existence in 1789, but came into existence in recent years and long after the Statute in Ohio had been passed authorizing class actions in Courts at law. The fact that prior to 1789 the Chancery Court may or may not have had general jurisdiction of class actions is not the test. This question comes within the rule invoked in the following cases:

*United Copper Securities Co.* v. *Amalgamated Copper Co.*, 232 Fed. 574;
*Matthews et al.* v. *Rodgers*, 284 U. S. 521;
*Henrietta Mills* v. *Rutherford County*, 281 U. S. 120;
*Georgia* v. *Chattanooga*, 264 U. S. 472.

In each of these cases a State statute was directly applied to oust Federal equity jurisdiction. Injunctions were sought against the collections of tax, the State enacted statutes giving adequate remedy at law. The State statute created a legal remedy at law, which by the Conformity statute of the United States provided an adequate remedy on the law side of the Federal court. In the case at bar, our State statute provides a comparable right to proceed at law in the Federal court. Injunction as an equitable right existed prior to 1789, the same as an equitable class action existed prior to 1789. But the injunction in the

above named cases did not lie to the collection of this particular tax because the tax did not exist, just as in the case at bar a class suit did not lie in this particular type of case because the statutory liability did not exist.

A class action is cognizable in equity only because there is no plain and adequate remedy at law. A class action does not necessarily involve any other equitable jurisdiction. When equitable jurisdiction is sought merely on the ground of inadequacy of the remedy at law, the general rule invoked above that State statutes can not enlarge or diminish the equity jurisdiction of Federal courts has no application. See concurring opinion of Judge Hook in

*Union Pacific R. R.* v. *Board of Commissioners* (8th C. C. A.) 222 Fed. 651.

The reason for this exception to the general rule is apparent. Courts will not so lightly set aside a constitutional right of trial by jury, a Congressional Act that no suit shall be maintained in equity where there is a plain and adequate remedy at law, and the Conformity Section of the Act of Congress on such a technicality. *Section 384 of Title 28, U. S. C. A.* has been in force and effect as long as the statutes granting jurisdiction to Federal courts, and is certainly entitled to the same legal respect as the statute granting equitable jurisdiction. To say that such statute shall not be effective as against a State enactment wherein equity jurisdiction is assumed merely because there is no adequate remedy at law, and no equitable rights other than that are properly sought to be enforced, would be an anomaly. Especially would such a rule be obnoxious in cases in which the right of trial by jury, so carefully guarded in the Constitution, was being disregarded.

Inasmuch as there is no equitable administration of a trust fund in this Court either necessary or proper under the facts as revealed in this Record, and inasmuch as the re-

spondents have a complete and adequate remedy at law, this Bill has no equity, but comes directly within the reasoning of

*Hale* v. *Allinson*, 188 U. S. *supra*.

See also *Kelly* v. *Gill*, 245 U. S. 116.

Respondents attempt to distinguish *Hale* v. *Allinson*, *supra*, and the other cases cited in our Brief by stating that in *Hale* v. *Allinson* no trust fund is sought to be administered. That statement is true. No trust fund is properly sought to be administered in the case at bar. The administration of the trust fund being out of the case, there is no distinction between *Hale* v. *Allinson* and the present case. The cases relied upon by respondents wherein the Court holds equitable jurisdiction to be properly involved are those in which the equitable administration of a fund is not only proper but necessary.

## III.

## The Bill is Multifarious Due to Misjoinder of Parties Defendant.

Respondents claim there is no misjoinder, citing the *Cago* and the *Conway* cases. Both of these cases allege the insolvency of the Bank and seek the equitable administration of a fund. The amount of the assessment and the declaration of the necessity thereof were necessary in both those cases. They may be classed as primary suits. Having properly obtained the jurisdiction in both of those cases of the shareholders who were proper, if not necessary, parties to determine the insolvency of the corporation and to declare the necessity for an assessment, the Court retained jurisdiction to completely adjudicate all issues before it. We have no such situation in this case. The shareholders each have a separate and distinct obligation

to the creditors, assumed by virtue of independent contracts, none of which has any relation to the other, and no issue with the creditors is common to the shareholders. The claimed liability of the shareholders to the creditors is individual, made so specifically by the Statute. In such cases, there can be no joinder of shareholders.

See

*Kelly* v. *Gill*, 245 U. S. 116,

which involved the collection of individual subscriptions of shareholders.

Whether or not a bill is multifarious due to misjoinder of defendants is within the sound discretion of the Court.

See

*Alabama* v. *Arizona*, 296 U. S. 291;

*Brown* v. *Guaranty Trust and S. & D. Co.*, 148 U. S. 403, 410.

The District Court properly exercised its sound discretion in this matter. The District Court must have taken into consideration the various factors necessary to the exercise of that discretion. It must have considered the separate and distinct nature of the defenses, the individual contracts of purchase of shares, the individuality of the liability and, above all, the conveniences and inconveniences to the shareholders and the creditors, the hardships or benefits to the creditors and the shareholders, and all other pertinent factors. This discretion should not be lightly overruled. The same factors in determining the sound discretion of the Court in misjoinder are taken into consideration when the Court exercises its discretion as to the assumption of Federal equity jurisdiction on the ground of multiplicity of suits.

*Alabama* v. *Arizona*, 296 U. S. 286, in determining there was a misjoinder of parties defendant, cited the case of

*Hale* v. *Allinson*, 188 U. S. 56 (a case involving multiplicity of suits), as controlling in the matter of misjoinder of parties. *Hale* v. *Allinson* is the law of the United States today. It is quoted with approval in the case of *Di Giovanni* v. *Camden Fire Insurance Co.*, 296 U. S. 64, at page 70. The bill should be dismissed for misjoinder of the defendants.

## IV.

**The Bill Should be Dismissed as to One Hundred Twenty-Nine (129) Shareholders, Each of Whom Appears in the Face of the Bill to be Liable for Less Than Three Thousand Dollars ($3,000.00).**

The claims of the defendants in an action of this type can not be aggregated for the purpose of acquiring jurisdiction. This is definitely determined in the following cases:

*Di Giovanni* v. *Camden Fire Insurance Co.*, 296 U. S. 64;
*Sovereign* v. *O'Neill*, 266 U. S. 292;
*Hale* v. *Allinson*, 188 U. S. 56;
*Broderick* v. *American General Corp.*, 71 F. (2d) 864;
*Citizens Bank* v. *Cannon*, 164 U. S. 319.

The bill should further be dismissed as to all of the defendants except the Western Securities Company upon the further ground as set forth in our original brief that the lawful par value of stock of Joint Stock Land Banks is restricted to five ($5.00) dollars per share. None of the defendants, except Western Securities Company, is claimed to have a sufficient number of shares at five ($5.00) dollars per share to be liable for three thousand ($3,000.00) dollars.

*Section 674, Title 12, U. S. C. A.* is applicable to Joint Stock Land Banks, and is made so expressly by *Section 811, Title 12, U. S. C. A. Section 674, Paragraph Third*

*thereof,* gives the power to Federal Land Banks, through their temporary directors, to make an organization certificate, which shall specifically state

> "the amount of capital stock and the number of shares into which the same is to be divided."

The organization certificate is thereby required to state only two things pertaining to capital stock, neither of which things is restricted to par value stock. *Sections 674 and 811* standing alone would give to Joint Stock Land Banks the power to issue stock either with or without par value.

*Section 812, Title 12 U. S. C. A.,* imposing double liability, limits such liability to the *par value* of the stock. Certainly, Congress did not intend that Joint Stock Land Banks could issue stock without par value, which would avoid double liability. Therefore, we must look to the other Sections to find the restriction against the issuance by Joint Stock Land Banks of no par stock. The restricting Sections are *692 and 813. Section 813,* reading as follows

> "Except as otherwise provided, joint stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on Federal land banks by this chapter, so far as such restrictions and conditions are applicable,"

refers to *Section 692,* which latter section contains the restriction not only to par value stock but to five ($5.00) dollars per share. To construe *Section 813* as applying only to affairs of the corporation after organization is tantamount to saying that Joint Stock Land Banks could issue no par stock.

Respondents say we are estopped from making the contention that the limit of the liability of the shareholders is five ($5.00) dollars per share.

The attempted issue of par value in excess of five ($5.00) dollars per share, to-wit, one hundred ($100.00) dollars per share, is *ultra vires.*

See

*Central Transportation Co.* v. *Pullman,* 139 U. S. 24;
*Marion* v. *Sneeden,* 291 U. S. 262;
*Texas & Pacific R. R. Co.* v. *Potterf,* 291 U. S. 245;
*Angelo-American Land* v. *Lombard,* 132 Fed. 721;
*Awoten* v. *Atlas Exchange Nat'l Bank,* 295 U. S. 209.

Estoppel has no application where the transaction is truly *ultra vires.*

*California Bank* v. *Kennedy,* 167 U. S. 362;
*McCormick* v. *Market Bank,* 165 U. S. 537;
*Central Transportation Co.* v. *Pullman,* 139 U. S. 24.

The fact that the creditors purchased their bonds in reliance upon the fact that the shares had printed thereon "one hundred ($100.00) dollars per share par value" does not create an estoppel, inasmuch as they are conclusively charged with knowledge of the law that the par value is limited to five ($5.00) dollars per share.

*McCormick* v. *Market Bank,* 165 U. S. 538.

V.

**The Bill Should be Dismissed as to the Defendant Executors or Administrators for Failure to Allege that the Claims were Presented for Allowance or Rejection in Accordance with the General Code of Ohio.**

Respondents' reply to this is that respondents' cause of action against the creditors did not arise until after the four months' period expired within which to present their claims to the executors and administrators and to so construe the statute would render it unconstitutional as being in violation of the Fourteenth Amendment.

*Section 10509-112 of the General Code* provides:

> "Creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment. Such executor or administrator shall allow or rejeet all claims, except contingent claims, within thirty days after their presentation. Any claim presented after the time herein provided shall not prevail as against bona fide purchasers or as against executors and administrators who have acted in good faith, or against a surviving spouse who has made the election to take under the will or at law, and, except as to negotiable instruments maturing subsequent to the expiration of such time, any such late claim shall not prevail as against bona fide distributees."

This Section fully satisfies the Fourteenth Amendment.

The argument of respondents that statutes of limitations are not binding but are controlling in actions of equity has no application. We are not seeking to enforce a statute of limitations. We are seeking a dismissal on the ground that the respondents did not allege that they complied with a condition precedent as defined by the Statutes of Ohio, to wit, the presentation of a claim within or without the four months' period before bringing their action.

Appellants properly raised the question in two ways:

1st. By specific Motion of Executors setting out specifically and definitely the failure to present (R. 55, 56); and

2nd. The Motion of other Executors (R. 55, 58) wherein Motions are made to dismiss on the ground the Bill does not state a cause of action against the particular defendants.

## Conclusion.

We submit, therefore, that the decree of the Circuit Court of Appeals should be reversed. If the bill in equity should have been dismissed by the District Court of the United States upon any one of the grounds raised, the decree of the Circuit Court of Appeals would have been an affirmance.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1936.

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*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

The petition is for a writ of certiorari to review the *intermediate* order of the Circuit Court of Appeals for the Sixth Circuit, reversing the order of the District Court of the United States for the Southern District of Ohio, Western Division, dismissing the bill of complaint.

This court should deny the petition because (a) the decision of the Circuit Court of Appeals is in accord with the decision of the Circuit Court of Appeals for the Second Circuit in *Brusselback, et al.* v. *Cago Corporation, et al.* (N. Y.), 85 Fed. (2nd) 20, certiorari denied 57 S. Ct. 111 (sometimes hereinafter called "*Cago* case"), in which case an action was brought by the same plaintiffs to enforce the

identical liability against the New York stockholders of the same bank; (b) the decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals; (c) the petitioners, contending that the action should be at law and not in equity, took the position in the District Court and in the Circuit Court of Appeals that the decree of the United States District Court for the Northern District of Illinois in *Brusselback* v. *Chicago Joint Stock Land Bank, et al.*, 85 Fed. (2nd) 617, certiorari denied 57 S. Ct. 320, had determined the necessity for and the amount of the assessment and as to those matters such decree was binding upon all stockholders, including the petitioners; consequently, the petitioners are estopped from asserting a contrary position here; (d) the petitioners' contention as to the effect of the local probate laws of Ohio is entirely without merit; (e) there are no questions of public interest involved; and furthermore (f) if certiorari should be granted and, upon hearing, the decree reversed by this court, no benefit would accrue to the petitioners; manifestly the respondents would have leave to amend their bill and the final result would be the same, except that the petitioners might benefit by the ensuing delay.

## STATEMENT OF CASE.

This is a class suit in equity, brought by plaintiffs (respondents here) upon behalf of themselves and all other creditors to enforce the liability of the Ohio stockholders of the Chicago Joint Stock Land Bank (hereinafter called "Bank").

The Bank was organized under the Federal Farm Loan Act. Its outstanding capital was $4,000,000.00, divided into shares of the par value of $100.00 each. It issued bonds pursuant to the Act of Congress in excess of $42,000,000.00. Its assets were invested in farm mortgages. In 1932 the Federal Farm Loan Board declared the Bank to be insolvent and placed its assets in the hands of a receiver for liquidation. The liquidation is still in progress.

Immediately after the appointment of the receiver the present plaintiffs, in order to enforce the stockholders' liability, filed their bill in the United States District Court in Chicago, where the Bank was located. The bill was filed pursuant to *Wheeler* v. *Greene*, 280 U. S. 49, which denied the right of the statutory receiver to enforce the liability and held that such liability was enforcible only by a bill in equity filed by creditors. In this suit (sometimes hereinafter called "*Chicago* suit"), the Bank and all of the stockholders, wherever residing, were named as defendants. Those residing in Illinois were served. The Illinois defendants answered and the cause was referred to a Master. The Master found that the Bank was insolvent and that its liabilities exceeded its assets to the extent of $12,000,000.00. The Master recommended an assessment of 100 per cent against the stockholders. The court approved the Master's Report and entered a decree assessing all stockholders 100 per cent of the par value of their shares and entered judg-

ment against those defendants who had been served. Appeal was taken to the Circuit Court of Appeals for the Seventh Circuit. The decree of the District Court was affirmed. *Brusselback* v. *Chicago Joint Stock Land Bank*, 85 Fed. (2nd) 617. Certiorari denied 57 S. Ct. 320.

Shortly after the entry of the decree by the District Court in Chicago the same plaintiffs (respondents here) filed bills in equity in the Federal District Courts of New York and Ohio to collect from the New York and Ohio stockholders respectively. In each of these bills the substance of the decree of the United States District Court for the Northern District of Illinois in *Brusselback* v. *Chicago Joint Stock Land Bank* was alleged. The bill in *Brusselback* v. *Cago* contains the following allegation:

> "Said decree of the United States District Court for the Northern District of Illinois, Eastern Division, fixing and determining the necessity, extent and amount of said assessment against said stockholders of said Chicago Joint Stock Land Bank and the amount due and owing to the creditors of said Chicago Joint Stock Land Bank by said stockholders of the Bank pursuant to said Federal Farm Loan Act (U. S. C. A., Title 12, Chapter 7) is effective and binding upon all of the stockholders of said Bank wherever residing, irrespective of whether such stockholders were parties of record to said proceedings had before said United States District Court for the Northern District of Illinois, Eastern Division, and said decree effectively adjudicates against the defendants herein that all of the stockholders of said Chicago Joint Stock Land Bank, wherever residing, are justly indebted to and liable to the creditors of said Chicago Joint Stock Land Bank, including the complainants herein, for an assessment equal to one hundred per cent (100%) of the par value of the shares of stock held by them, which amount is set forth herein in Exhibit A, attached hereto and made a part hereof."

An allegation substantially the same is contained in the bill of complaint filed in this suit. (R. 5.)

Motions to dismiss upon various grounds were filed in both the New York and Ohio suits and the District Judges in both instances dismissed the bills. Appeals were taken to the respective Circuit Courts of Appeals and the District Court was reversed in each case. The Circuit Court of Appeals for the Second Circuit rendered its opinion on July 3, 1936, in the case entitled *Brusselback, et al.* v. *Cago Corporation, et al.* Certiorari was denied by this court, 57 S. Ct. 111.

The Circuit Court of Appeals for the Sixth Circuit rendered its opinion on December 15, 1936, in the case of *Brusselback* v. *Andis,* now sought to be reviewed here, and in such opinion the court cited and relied upon *Brusselback* v. *Cago* and also *Brusselback* v. *Chicago Joint Stock Land Bank, supra.* Therefore, the Second Circuit and the Sixth Circuit are in entire accord in these identical cases. However, after the *Cago* case and before the decision by the Sixth Circuit in the case here, the Second Circuit rendered a decision on December 7, 1936, in *Holmberg, et al.* v. *Carr, et al.,* 86 Fed. (2nd) 727 (hereinafter sometimes called "*Holmberg* case"), and the petitioners contend that such decision is in conflict with the decision of the Sixth Circuit, here sought to be reviewed. If the *Holmberg* case is in conflict with the decision of the Circuit Court of Appeals in the case here, it is equally in conflict with the Second Circuit's own decision in the *Cago* case. It is, in fact, except possibly as to dictum in conflict with neither.

## Point I.

### CERTIORARI HAS BEEN DENIED BY THIS COURT IN AN IDENTICAL CASE.

Petitioners assert that the bill of complaint contains no allegations as to the insolvency of the Bank or as to the necessity for an assessment against the stockholders other

than it relies upon the decree of the United States District Court in the District where the Bank is located, and therefore that the Circuit Court of Appeals should have affirmed the lower court's order, dismissing the bill, by reason of *Holmberg* v. *Carr, supra.* The Second Circuit decided *Holmberg* v. *Carr* shortly after deciding *Brusselback* v. *Cago* and in the *Holmberg* case the court referred to the *Cago* case and gave no suggestion that it should be reversed or modified.

It was entirely clear to the Second Circuit, when deciding *Brusselback* v. *Cago,* that the plaintiffs relied upon the decree of the United States District Court of Illinois (*Chicago* case) in determining the necessity for and the amount of the assessment against the defendants in New York, for the decision contains the following language:

> "A suit was brought by creditors in the United States District Court, Northern District of Illinois, Eastern Division, against all the bank's stockholders to assess and enforce their liability and a decree was entered assessing the stockholders 100% of the par value of the shares of stock held by them.
>
> "It is here alleged that such decree, to the extent that it fixes the necessity for and the amount of the assessment, is effective and binding upon all stockholders of the bank irrespective of whether or not they were served in that proceeding."

With such pleading and with such theory the decision found no fault and when the matter was presented to the Sixth Circuit in the present case the court followed *Brusselback* v. *Cago.*

In the *Holmberg* case the plaintiffs proceeded upon a theory entirely different from that adopted by the petitioners in the *Cago* case and in the case here and sought different relief. The bill of complaint in the *Holmberg* case alleged that the Minnesota Joint Stock Land Bank had become insolvent and the creditors had brought a suit in the

District Court of Minnesota; that the court had entered a decree assessing all stockholders, whether served with process or not, 100 per cent of the par value of their shares and had appointed a receiver to collect the assessment. Thus far the bill follows the procedure in the *Cago* case and in the case here, but departs from it in that the prayer of the bill is not for judgments against the stockholders upon the assessment that had been fixed in the Minnesota District Court, but for the appointment by the District Court in New York of an ancillary receiver to collect from stockholders resident in that district. Carr, a defendant stockholder, filed an answer. His answer was summarily stricken as a sham and as frivolous and an ancillary receiver was appointed by the District Court. Upon review, the Circuit Court of Appeals held that the District Court had no power to strike an answer upon the ground that it was a sham and frivolous and also that power was lacking in the court to appoint an ancillary receiver. Such was the extent of the decision upon the issues presented to the Circuit Court of Appeals. The court, however, went further and by way of dictum stated that the assessment in the Minnesota District Court had no extraterritorial effect and therefore the bill should have been dismissed with leave to the plaintiffs to plead over.

It is one thing to say that the decree of the Federal Court in Minnesota had no extraterritorial effect to the extent of empowering another Federal Court in a different jurisdiction to appoint an ancillary receiver, and it is quite a different thing to say that the decree of the Minnesota District Court cannot be used as evidence for the purpose of showing the necessity for and the amount of the assessment against stockholders in other jurisdictions. The actual decision of the case is obviously correct; the dictum, if it is to be given the interpretation as contended for by

the petitioners, is manifestly wrong. The consequence of the dictum, if so interpreted, is that the amount of the assessment would have to be determined anew in each jurisdiction and such a holding is necessarily based upon the assumption that the amount of the assessment would be different in different jurisdictions. This would mean that the various assessments would not be uniform. The stockholders in one jurisdiction would be compelled to pay a different amount from the stockholders in another, all depending upon where such stockholders happened to reside. Thus, the dictum, if followed in the case here, would lead to manifest injustice.

In the *Chicago* case the Bank was a party defendant. The Illinois stockholders, who were of the same class as non-resident stockholders, were also defendants and were at all times vigorously defending. The final decree fixed the assessment at 100 per cent of the par value of the shares held by all stockholders. The defendants appealed to the Circuit Court of Appeals, asserting that the proof was not sufficient. The decree was sustained and this court denied certiorari. The plaintiffs in that case are the plaintiffs in the case here. The same plaintiffs then filed their bill in the *Cago* case and asserted that the *Chicago* decree was binding upon the New York stockholders as to the necessity for and the amount of the assessment. The Circuit Court of Appeals so found and therefore we submit that the dictum in the *Holmberg* case was not intended in any way to modify that court's previous opinion in the *Cago* case, for the court referred to the *Cago* case and did not indicate, even remotely, that it was in any manner dissatisfied with its former opinion.

Therefore, we contend that the Sixth Circuit was in all respects justified in relying upon the *Cago* case, a case identical with the case before them, and furthermore, that

there is no actual conflict between the decisions of the Second and the Sixth Circuits unless the dictum in the *Holmberg* case be given a strained construction and relied upon as a decision.

Even if the petitioners' interpretation of the dictum in the *Holmberg* case is correct, the petitioners are estopped to rely upon it here, as will be immediately demonstrated.

## Point II.

PETITIONERS ARE ESTOPPED TO ASSERT HERE THAT THE CHICAGO DECREE IS NOT BINDING UPON THEM AS TO THE NECESSITY FOR AND THE AMOUNT OF THE ASSESSMENT.

The petitioners, as defendants in the Ohio District Court, filed motions to dismiss the bill. In oral argument before the District Judge they argued that (a) inasmuch as an assessment against all the stockholders had been made by the United States District Court in the District where the Bank was located, such assessment was conclusive as to them; and (b) that in view of the fact that the assessment had been fixed at 100 per cent of the par value of the shares, suits to collect such assessments would have to be brought at law and that a suit in equity was not maintainable. They cited *Casey* v. *Galli*, 94 U. S. 673, *Kennedy* v. *Gibson*, 8 Wall. 498, and similar cases. The District Court agreed and dismissed the bill. Petitioners took the same position upon appeal, as will be seen from their brief.

The following is quoted from page 4 of the brief filed by petitioners as appellees in the Circuit Court of Appeals:

> "This suit in Ohio is merely one to *collect* the assessment heretofore assessed and levied by the Chicago decree.
>
> "In such an action to collect a shareholder's double liability assessment, *theretofore fixed and levied*, the

remedy is at law. This legal remedy is adequate, full and complete, and equitable relief is uniformly denied. (Citing cases)."

The following appears on Page 9 of such brief;

"In this present case the bill recites the assessments against the shareholders have already been made. (R., 5, 32.) We submit that it is immaterial whether the assessments provided for in the Federal Farm Loan Act (12 U. S. C. A., 812) be made by a court of equity, as directed in *Wheeler* v. *Greene*, or whether they be made by an administrative officer of the Government, such as the comptroller of the currency under the National Banking Act, 12 U. S. C. A., 64, as in *Casey* v. *Galli*, 94 U. S., 673, or the superintendent of banks under the New York Banking Act, as in *Broderick* v. *American General Corporation* (CCA-4), 71 F. (2d), 864, 867.

"*The important query is not how were the assessments made; but have the assessments been made?*

"Such assessment, once made in the manner provided by law (whether by an administrative officer or by a court of equity) is collectible, as any other fixed obligation, in an action at law."

Therefore, the petitioners having heretofore taken a position directly contrary to the position they now assert, are bound by the familiar rule of law to the effect that where a litigant once assumes a position in a case and obtains a ruling from the court favorable to such position, such litigant may not thereafter assume a contrary position. *Davis* v. *Wakelee*, 156 U. S. 680, 689.

## Point III.

### The Probate Laws of the State of Ohio are not pertinent.

Petitioners contend that under the probate laws of Ohio no action may be brought to adjudicate a claim against an executor of the estate of a deceased person unless the claim has first been presented to the executor within four months

after his appointment. In the present case many, if not all, of the executors had been appointed more than four months before any claim arose. It would seem to be sufficient answer to the above contention to point out that a law of any state which bars a claim before it arises is invalid under the Fourteenth Amendment. Petitioners, however, apparently misconstrue the probate laws of Ohio for the Supreme Court of that state has held adversely to petitioners' contention.

In *State, ex rel. Fulton, Supt. of Banks,* v. *Bremer,* 130 O. S. 227, the court said (page 236):

> "There is no law of Ohio making it mandatory upon a claimant against a decedent's estate to present his claim for allowance before entering suit."

Petitioners interpret the probate laws of Ohio as requiring a claimant to present his claim to an executor within four months after his appointment as a condition precedent to the bringing of a suit to adjudicate such claim and rely upon *Pufahl, Receiver,* v. *Estate of Parks,* 81 L. Ed. 73, as holding that such local probate laws are binding upon claimants even though they bring their action in a Federal Court.

Petitioners misconceived the decision in that case. In the first place, the claimant there proceeded in the state court and, more important, the question in that case was not whether the claimant had the right to have his claim adjudicated but whether he had the right to participate in the assets of the estate and if so on what basis. In the case here the respondents are merely seeking an adjudication of their claims in the Federal Court, and this court, in the *Pufahl* case, discussed a similar situation and in speaking of the right of a claimant who otherwise had the right to litigate in the Federal Court, said:

> "While he may not be denied his right to prosecute an action to judgment or a suit to final decree in the

federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. The marshalling of that claim with others, its priority, if any, in distribution, and all similar questions, are for the probate court upon presentation to it of the judgment or decree of the federal court."

## Conclusion.

The petitioners have raised no questions which warrant review by this court. There are no questions of public interest involved. The decision of the Circuit Court of Appeals for the Sixth Circuit is in accord with the decision of the Second Circuit in *Brusselback* v. *Cago, supra,* an identical case, in which this court has denied certiorari, and there is no conflict as asserted by the petitioners between the decisions of the Sixth Circuit and the Second Circuit.

Moreover, even though certiorari be granted and the decision of the Circuit Court of Appeals reversed, the respondents would undoubtedly have the right to amend their bill and allege the insolvency of the Bank, the extent thereof, and the necessity for the assessment by allegations independent of any reference to the *Chicago* decree, and as the respondents are the same persons who were the plaintiffs in the *Chicago* case, and as the same proof would be available to them in the Ohio case, the amount of the assessment, as determined anew in Ohio, would be the same as determined in Illinois and no purpose would have been served other than to give delay to the petitioners.

Therefore, no useful purpose would be served in granting the writ applied for and the petition for writ of certiorari should be denied.

Respectfully submitted,

J. Arthur Miller,
George R. Murray,
*Solicitors for Respondents.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1937.

No. 108

ANDREW J. CHRISTOPHER, THIRD NATIONAL BANK & TRUST CO., AS EXECUTOR OF THE ESTATE OF GEORGE W. WEIMER, DECEASED, ET AL.,

*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.,

*Respondents.*

## REPLY BRIEF OF RESPONDENTS.

J. ARTHUR MILLER,
GEORGE R. MURRAY,
*Solicitors for Respondents.*

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*Petitioners,*

*vs.*

W. E. BRUSSELBACK AND W. I. BELL, STEPHEN D. FORST, ET AL., ETC.,

*Respondents.*

## REPLY BRIEF OF RESPONDENTS.

### STATEMENT OF CASE.

This is a class suit in equity, brought by respondents in the Federal District Court of Ohio upon behalf of themselves and all other creditors to enforce the double liability provided for in U. S. C. A. Title 12, Sec. 812, against the Ohio stockholders of the Chicago Joint Stock Land Bank (hereafter called Bank). A history of the previous litigation is necessary to a full understanding of the matters before this Court.

The Bank was organized under the Federal Farm Loan Act. Its outstanding capital was $4,000,000.00, divided into

shares of the par value of $100.00 each. It issued bonds pursuant to the Act of Congress in excess of $42,000,000.00. Its assets were invested in farm mortgages. In 1932 the Federal Farm Loan Board declared the Bank to be insolvent and placed its assets in the hands of a receiver for liquidation.

Shortly after the receivership the present respondents filed their bill in behalf of themselves and all other creditors in the United States District Court in Chicago (hereafter called the *Chicago* Case) to enforce the stockholders' liability. The bill was filed pursuant to *Wheeler* v. *Greene*, 280 U. S. 49, which denied the right of the statutory receiver to enforce the liability and held that such liability was enforceable only by a bill in equity filed by the creditors of the Bank. In the *Chicago* Case the complainants acted in accordance with the procedure indicated in the so-called *Conway* Cases (*infra* p. 3). In these cases creditors of a Kentucky bank sued in the then U. S. Circuit Court in Kentucky to enforce the stockholders' liability created by a Kentucky statute. The Kentucky statute, like that involved here, made stockholders in a bank liable for the debts of such bank to the extent of the par value of their stock. The action was in equity and numerous stockholders were joined as defendants. Some of the stockholders were liable for more than $2,000.00; others for less, so that the questions presented were identical with those later arising in the *Chicago* Case, namely, whether there was jurisdiction in equity, whether the stockholders could be joined in a single suit, and whether the court had jurisdiction over a stockholder who alone was liable for less than the jurisdictional amount. All of these questions were answered in the affirmative both by the District Court and the Circuit Court of Appeals, and the Supreme Court denied certiorari. The courts held that the suit was properly brought in equity, that the amount of the fund to be collected determined the juris-

dictional amount and that an equity receiver was necessary to collect, administer and distribute the fund to the creditors.

*Conway* v. *Owensboro,* 165 Fed. 822.
*Conway* v. *Owensboro,* 185 Fed. 950.
*Alsop* v. *Conway,* 188 Fed. 568.
*Robertson* v. *Conway,* 188 Fed. 579.
*Alsop* v. *Conway,* 223 U. S. 720 (certiorari denied).

In the *Chicago* Case the Chicago Joint Stock Land Bank and all of the stockholders, exceeding one thousand in number, were named as defendants. Those residing in Illinois, over three hundred in number, were served. Over two hundred of these defendants answered and the cause was referred to a Master. (R. 28-29.) The Master found that the Bank was insolvent and that its liabilities exceeded its assets to the extent of $12,000,000.00. The Master recommended an assessment of 100 per cent against all stockholders. The Court approved the Master's report and entered a decree (hereafter called Chicago decree), assessing all stockholders 100 per cent of the par value of their shares, but rendered judgment only against those who had been served. (R. 4-5.)

The defendants appealed and the decree of the District Court was affirmed. *Brusselback, et al.* v. *Chicago Joint Stock Land Bank, et al.,* 85 Fed. (2nd) 617. (This decision hereafter referred to as *Brusselback* v. *Bank.*) This court denied certiorari January 11, 1937. (299 U. S. 615.)

The stockholders of the Bank are residents of many states. The Chicago decree fixed the assessment as to all, but gave judgment only against those served in Illinois. The District Court in Chicago, having previously appointed an equity receiver, the decree empowered such receiver to collect, administer and distribute the fund collected. The Chicago decree also authorized the receiver to collect from

foreign stockholders and to give acquittance to those making payment. (R. 39, f. 43.) This merely gave the Chicago receiver the right to receive payments voluntarily made by foreign stockholders. The decree did not authorize the Chicago receiver to sue in foreign jurisdictions and no such provision, in the absence of an Enabling Statute, would have been valid. *Hale* v. *Allinson,* 188 U. S. 56.

As the stockholders of the Bank were residents of many states, the question immediately arose, upon the entry of the Chicago decree, as to how collections should be enforced against those outside of Illinois. *Hale* v. *Allinson,* 188 U. S. 56, had decided that an action could not be brought against foreign stockholders by an equity receiver outside of the jurisdiction of his appointment, nor could the *statutory receiver* proceed by reason of *Wheeler* v. *Greene,* 280 U. S. 49. Therefore, the right of action was in the creditors and the next question arose as to whether it should be brought at law or in equity. The complainants in the *Chicago* Case, conceiving that the action was necessarily in equity, filed suits in the Federal courts of many states. These complainants also conceived that the procedure should follow the *Conway* Cases, as had been done in the *Chicago* Case, and that the procedure should be identical with that in the *Chicago* Case with one exception, to wit: that the assessment having already been made at the home of the corporation where a large class of the stockholders defended, it would be unnecessary to again make proof of the necessity for and the amount of the assessment, and that the Chicago decree could be relied upon to prove the amount of the assessment; other than this, all the procedure should be in accordance with that indicated in the *Conway* Cases. The bills having been so filed, motions to dismiss were filed by the various defendants in all of the jurisdictions and in each jurisdiction the defendants contended that the action by

the creditors should be at law and that the Federal jurisdictional amount was not involved. None of the defendants at any time contended that the assessment made in the Chicago decree was not conclusive and binding upon them. The motions filed in the New York case were first heard and the District court sustained the motions and dismissed the bill. *Brusselback* v. *Cago Corp.*, 14 Fed. Supp. 993. Appeal was taken to the Second Circuit and the lower court's decree was reversed. *Brusselback, et al.* v. *Cago Corp.*, 85 Fed. (2nd) 20 (hereafter called Cago Case). Certiorari was denied by this court October 26, 1936. (299 U. S. 586.)

In the *Cago* Case the Second Circuit cited the *Conway* Cases with approval and held:

> (a) That the statutory liability of the stockholders of a joint stock land bank is to the creditors as a body and must be enforced in equity in a representative suit in behalf of all of the creditors;
>
> (b) That the amount collected in enforcing statutory liabilities of stockholders of a joint stock land bank constitutes a trust fund to be administered by the court for the equal benefit of all creditors and that the jurisdictional amount is not determined by the amount claimed by any individual complainant or the amount due from any individual defendant, but is determined by the amount of the trust found sought to be collected.

Also, the court assumed that the Chicago decree was conclusive and binding as to the necessity for and the amount of the assessment, for the court said:

> "A suit was brought by creditors in the United States District Court, Northern District of Illinois, Eastern Division, against all the bank's stockholders to assess and enforce their liability, and a decree was entered assessing the stockholders 100 per cent of the par value of the shares of stock held by them.
>
> "It is here alleged that such decree, to the extent that it fixes the necessity for and the amount of the assessment, is effective and binding upon all stock-

holders of the bank irrespective of whether or not they were served in that proceeding."

With such pleading and with such theory the decision found no fault.

The District Court in Ohio likewise dismissed the bill in the case now here. Appeal was taken to the Sixth Circuit and that court reversed the District Court and in its opinion cited and relied upon *Brusselback* v. *Cago* and also *Brusselback* v. *Chicago Joint Stock Land Bank, supra.* Therefore, the Second Circuit and the Sixth Circuit were in entire accord in these identical cases.

However, after the *Cago* Case, but before the decision by the Sixth Circuit in the case here, the Second Circuit rendered a decision on December 7, 1936, in *Holmberg, et al.* v. *Carr, et al.*, 86 Fed. (2nd) 727 (hereafter called *Holmberg* Case) and the petitioners here, in praying for certiorari, contended that such decision was in conflict with the decision of the Sixth Circuit, here sought to be reviewed. As this court granted certiorari, it necessarily follows that it has found such a conflict.

The conflict, however, arises as to the extraterritorial effect of the Chicago decree and does not relate to any matter which was contested either in the District Court or in the Circuit Court of Appeals.

# ARGUMENT.

## POINT I.

### THE DECREE OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT WHERE THE CHICAGO JOINT STOCK LAND BANK IS LOCATED, DETERMINING THE NECESSITY FOR AND THE AMOUNT OF THE ASSESSMENT TO BE COLLECTED AGAINST THE STOCKHOLDERS OF THE CHICAGO JOINT STOCK LAND BANK, IS BINDING UPON THE STOCKHOLDERS WHEREVER LOCATED.

The petitioners' first Specification of Error is that the bill of complaint, as amended, does not state facts sufficient to constitute a good cause of action, either legal or equitable, because the bill does not allege insolvency of the Bank or the necessity for the assessment.

Paragraph 9 of the bill of complaint (R. 4) alleges that in the District Court in Chicago the Master found the Bank to be insolvent and that its liabilities exceeded the amount of its assets to the extent of approximately $12,000,000.00; that the Master found that an assessment of 100 per cent against the stockholders would be necessary, that the Court approved the Master's report and entered a decree assessing the stockholders of the Bank for an amount equal to 100 per cent of the par value of the shares held by them.

Paragraph 10 of the bill (R. 5) alleges that the decree of the United States District Court for the Northern District of Illinois is effective and binding not only upon the Illinois stockholders who were served with process in the cause, but is equally effective and binding upon all the stockholders of the Bank. There is some question as to whether the allegations in Paragraph 9 are not sufficient in themselves upon which to base proof that the Bank was insolvent and the extent of such insolvency, independent of any

aid from the Chicago decree. However, as the bill was filed upon the theory that the Chicago decree is conclusive and binding upon foreign stockholders as to the necessity for and the amount of the assessment, we argue the matter upon that basis here.

Petitioners rely entirely upon *Holmberg* v. *Carr*, 86 Fed. (2nd) 727.

In the *Holmberg* Case the plaintiffs (creditors of the Minnesota Joint Stock Land Bank) proceeded upon a theory entirely different from that adopted by the respondents in the *Cago* Case and in the case here and sought different relief. The bill of complaint in the *Holmberg* Case alleged that the Minnesota Joint Stock Land Bank had become insolvent and the creditors had brought a suit in the District Court of Minnesota; that the court had entered a decree assessing all stockholders, whether served with process or not, 100 per cent of the par value of their shares, and had appointed a receiver to collect the assessment. Thus far, the bill follows the procedure in the *Cago* Case and in the case here, but departs from it in that the prayer of the bill is not for judgments against the stockholders upon the assessments which had been fixed in the Minnesota District Court, but for the appointment by the District Court in New York of an ancillary receiver to collect from stockholders resident in that district. Carr, a defendant stockholder, filed an answer. His answer was summarily stricken as a sham and as frivolous and an ancillary receiver was appointed by the District Court. Upon review the Circuit Court of Appeals held that the District Court had no power to strike an answer upon the ground that it was a sham and frivolous and also that power was lacking in the court to appoint an ancillary receiver. Such was the extent of the decision upon the issues presented to the Circuit Court of Appeals. The court, however, went further and stated that the assessment in the Minnesota District Court had no ex-

traterritorial effect and therefore the bill should have been dismissed with leave to the plaintiffs to plead over.

Respondents assert that the language in the *Holmberg* Case to the effect that the Minnesota decree has no extra-territorial effect is not the law and rely upon the following:

*Bernheimer* v. *Converse,* 206 U. S. 516.
*Converse* v. *Hamilton,* 224 U. S. 243.
*Selig* v. *Hamilton,* 234 U. S. 652.
*Marin* v. *Augedahl,* 247 U. S. 142.
*Chandler* v. *Peketz,* 297 U. S. 609.
*Hawkins* v. *Glenn,* 131 U. S. 319.
*Corrington* v. *Crosby,* 210 N. W. 342; 48 A. L. R. 660.
*Hall* v. *Ballard,* 90 Fed. (2nd) 939.
*Howarth* v. *Lombard,* 175 Mass. 570, 56 N. E. 888.
*Sheafe* v. *Larimer,* 79 Fed. 921.
*Goss* v. *Carter,* 156 Fed. 746.
*Smith* v. *Swormstedt,* 16 How. 288; 14 L. Ed. 942.
*Hartford L. Ins. Co.* v. *Ibs,* 237 U. S. 662.
Equity Rule 38.

The first five of the above decisions arose under the Minnesota statute which provides for double liability upon stockholders in Minnesota corporations.

In *Hale* v. *Allinson,* 188 U. S. 56, a Minnesota corporation was adjudged insolvent by the State Court in Minnesota, and a receiver was appointed to liquidate its assets. Later corporate creditors sued the corporation and its stockholders in Minnesota to enforce the stockholders' liability created by the Minnesota statute. This action was also in the State Court of Minnesota. The court entered a decree requiring the Minnesota stockholders who had been served to pay assessments of 100 per cent. The court by its decree also appointed a receiver and directed the receiver

to bring suits in foreign jurisdictions against foreign stockholders. The Minnesota receiver then filed a bill in equity against certain Pennsylvania stockholders in the Federal Court for the Eastern District of Pennsylvania. The defendants contended, first, that the Minnesota receiver could not sue in Pennsylvania, and second, that in any event the assessment having been fixed and determined at 100 per cent, the remedy was at law. The Supreme Court sustained both points. It is important to note, however, that this court assumed that the assessment in Minnesota was conclusive and binding; otherwise there would have been no reason for holding that the action would have to be at law, for on this point the court followed *Kennedy* v. *Gibson,* 8 Wall. 498; *Casey* v. *Galli,* 94 U. S. 677; *U. S.* v. *Knox,* 102 U. S. 422.

*Bernheimer* v. *Converse* and *Selig* v. *Hamilton, supra,* were also decided under the Minnesota statute, but in the meantime the statute had been amended expressly to provide that an assessment against the stockholders of a Minnesota corporation made in a judicial proceeding in Minnesota is conclusive and binding upon all stockholders, whether served with process or not, and also to provide that a receiver of a Minnesota corporation appointed by a Minnesota court might sue in foreign jurisdictions to enforce the stockholders' liability. So in the above cases the receiver brought suit in foreign jurisdictions, asserted that the Minnesota assessment was binding on foreign stockholders, the receiver obtained judgments, and the judgments were affirmed by this court on appeal. It was held by this court that the foreign stockholders were bound by the Minnesota assessment as they were severally represented in the Minnesota litigation by the corporation of which they were stockholders.

*Converse* v. *Hamilton, Marin* v. *Augedahl,* and *Chandler*

v. *Peketz, supra,* carried the principles of the former cases even further.

In the *Marin* Case there was an assessment against stockholders in Minnesota under the Minnesota statute, and the statutory receiver was appointed to enforce assessments against nonresidents. The receiver sued the stockholders in North Dakota. The North Dakota court held that the Minnesota court was without jurisdiction as to North Dakota stockholders who had not been served, and refused to give effect to the decree of assessment. This court held that the North Dakota judgment violated the constitution in that it failed to give full faith and credit to the decree of the Minnesota court. *Converse* v. *Hamilton* and *Chandler* v. *Peketz, supra,* were to the same effect.

In the *Holmberg* Case Judge Hand refers to such cases as the above, where a state statute is involved, and attempts to distinguish them from the facts in the case before him, saying:

> "* * * the assessment can be valid extraterritorially, if at all, only because it was made by a court in the home jurisdiction of the company. It is true that when there is a local statute making such assessments conclusive, they are so extraterritorially, certainly if made by a court. *Bernheimer* v. *Converse,* 206 U. S. 516; *Howarth* v. *Lombard,* 175 Mass. 570; *King* v. *Cochran,* 76 Vt. 141, 56 A. 667; Restatement of Conflict of Laws, § 186, Comment (c)."

This statement might be sufficient if *Bernheimer* v. *Converse, supra,* could be disregarded, but Judge Hand's opinion cannot be reconciled with this court's decision in that case. There Bernheimer had purchased stock in a Minnesota corporation. Subsequently the corporation failed and a creditor obtained a judgment, and execution being returned unsatisfied, he brought suit against the corporation for the appointment of a receiver and for the enforcement of the individual liability of its stockholders. Upon the hearing the Minnesota court ordered an assessment of 36 per cent upon each share and against each and every

stockholder, whether served with process or not. The receiver was authorized to prosecute actions against all of the assessed stockholders, whether served with process in the Minnesota action or not. In the meantime, Bernheimer had died and his estate was being probated in New York. Neither Bernheimer nor his executor had been served in the proceedings in Minnesota. The receiver brought suit against the executor in the Federal District Court of New York and asserted that the assessment by the Minnesota Court was conclusive and binding on the defendant executor by reason of the Minnesota statute, which statute, as it then existed, made such finding of the Minnesota court final and conclusive as to the neeessity for and the amount of the assessment against all stockholders, whether served or not. The defendant answered, saying that there had been no such statute in existence at the time Bernheimer became a stockholder and that under the Minnesota statute, as it existed at the time Bernheimer acquired his shares, he could have been held liable only if process was personally served upon him, and that therefore neither Bernheimer nor his executor could be bound by the existing Minnesota statute which had been adopted after Bernheimer had become a stockholder. Judgment was rendered for the receiver in the New York court and the matter came before the Supreme Court of the United States. In its opinion this court propounded the following question:

> "Is there anything in the obligation of this contract which is impaired by subsequent legislation as to the remedy, enacting new means of making the liability more effectual?"

The court answered its own question by pointing out that it had been frequently held by the courts in such cases that the representation which a stockholder has by virtue of his membership in a corporation is all that he is entitled to, and that the Minnesota statute, making the assessment

conclusive and binding upon those not actually served, merely adopted a procedure which had previously been given the sanction of the courts, and that the Minnesota statute and the procedure taken in Minnesota were binding upon the defendant and violated none of his constitutional rights.

Judge Hand in the *Holmberg* Case also sought to distinguish stock subscription cases which include that line of cases decided by this court, of which *Hawkins* v. *Glenn, supra,* is outstanding, and his opinion says:

> "As for a call upon a subscription, the situation is *toto coelo* different; for in that case there is a true contract made with the company as a promisee, and enforced as the shareholder intends it to be enforced."

However, the same distinction was attempted in *Bernheimer* v. *Converse, supra,* and was repudiated by this court as follows:

> "Nor can we see any substantial difference in this respect between a liability to be ascertained for the benefit of creditors upon a stock subscription and the liability for the same purpose which is entailed by becoming a member of a corporation through the purchase of stock, whereby a contract is implied in favor of creditors."

Therefore, we submit that this court has previously repudiated the distinctions attempted by Judge Hand both as to the cases involving the Minnesota statute and the cases involving stock subscriptions.

The Federal Farm Loan Act, providing for the stockholders' liability, is by no means unique. There have been many decisions considering the terms of state statutes similar in all respects to the Act here involved. In none of these cases has the statute been so narrowly construed as was the Federal Farm Loan Act construed by the Circuit Court of Appeals for the Second Circuit in *Holmberg* v. *Carr.* A well reasoned case, where the pertinent facts are identical with

the case here, is *Corrington* v. *Crosby*, 210 N. W. 342; 48 A. L. R. 660. There the Supreme Court of North Dakota held that a judgment or order of a Montana District Court declaring a bank insolvent and levying an assessment is conclusive on stockholders in North Dakota who were not parties or served with process.

In *Howarth* v. *Lombard*, 175 Mass. 570, 56 N. E. 888 (Sup. Jud. Ct. of Mass., 1900), the Court held that the determination by the State Court of Washington, fixing the amount of an assessment against stockholders of a Washington corporation, was determinative in a subsequent action brought in the Commonwealth of Massachusetts against stockholders resident in that State who had not been made parties defendant in the Washington State proceeding on the issue of the amount of the assessment to be collected from stockholders. The Constitution of the State of Washington provided:

> "Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable, equitably and ratably, and not one for another, for all contracts, debts and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof in addition to the amount invested in such shares."

A Washington State statute further provided as follows:

> "Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid on his subscription to the capital stock and not otherwise, provided that the stockholders of every bank incorporated under this act, or the territory of Washington, shall be held individually responsible, equitably and ratably," etc. (then following the exact language of the Constitution).

The Constitution and the statute of the State of Washington were therefore almost identical to the Federal Farm Loan Act here involved. The Supreme Judicial Court of

Massachusetts pointed out that the statute did not define the nature of the liability and contained nothing as to the means of enforcing it and that the method of enforcing it was left to be determined by the courts, and held that the decree of the Washington Court fixing the amount of the assessment was determinative of that issue in the subsequent action in Massachusetts, and that the statute did not require a separate assessment to be made in each state where the stockholders' liability is enforced. (The above case was cited with approval by this court in *Bernheimer* v. *Converse.*)

*Sheafe* v. *Larimer,* 79 Fed. 921 (C. C., N. D., Ia., Western District, 1897), involved the same Washington statute, and the court reached the same conclusion as the Supreme Judicial Court of Massachusetts in the *Howarth* v. *Lombard* case.

In *Goss* v. *Carter,* 156 Fed. 746 (C. C. A. 5th, 1907), the court held that a decision of a Nebraska court in determining the amount of the assessment to be levied against stockholders of a Nebraska corporation was binding in a subsequent suit brought against stockholders of the corporation residing in Texas. The Nebraska Constitution involved, set forth on page 751 of the opinion, provides as follows:

> "SECTION 7. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder; and all banking corporations shall publish quarterly statements under oath of their assets and liabilities.
>
> "SECTION 4. In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

Here again, the provisions of the Nebraska Constitution relating to the stockholders' liability are very similar to the provisions of the Federal Farm Loan Act. The Circuit Court of Appeals for the Fifth Circuit held that this statute did not require a separate assessment to be made in each district court where the stockholders' liability is sought to be enforced, and that the decision by the domiciliary court of the amount of the assessment is determinative of this issue in all subsequent suits to enforce the stockholders' liability.

*Hall* v. *Ballard,* 90 Fed. (2nd) 939, a recent decision by the Fourth Circuit, construing the National Banking Act, is also in point.

See also 80 L. Ed., 891, where the decisions passing upon the question argued under this Point are collected and digested.

THE CHICAGO DECREE IS BINDING ON ALL STOCKHOLDERS BY REASON OF EQUITY RULE 38.

Independently of the above cases, all of which dealt with stockholders' liability, we submit that the cases of *Smith* v. *Swormstedt,* 16 How. 288; 14 L. Ed. 942, and *Hartford L. Ins. Co.* v. *Ibs,* 237 U. S. 662; 59 L. Ed. 1165, the doctrine of which is embodied in Equity Rule 38, amply justified the respondents in relying upon the Chicago decree as being conclusive and binding on foreign stockholders.

Equity Rule 38 reads as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

To come within that rule it is not necessary in such a proceeding that the court appoint certain of the defendants to represent the others; it is sufficient if it appears from the allegations of the bill that an adjudication is sought which will be effective not only against those who were brought

before the court as defendants, but against others similarly related to the subject of dispute. It is not necessary to aver in terms that those who are made defendants are sued as representatives of the class of which they are shown to be members. (*McClelland* v. *Rose,* 247 Fed. 721, 724.) It is necessary, however, that there be a question of common or general interest to many persons constituting a class and that it be impractical to serve all.

This is the situation which prevailed in the *Chicago* Case. All of the stockholders constituted one class. The question as to the necessity for and the amount of the assessment was common to all. It was not only impractical but impossible to bring before the court those residing outside of Illinois. If Equity Rule 38 does not apply to the *Chicago* Case, it is difficult to imagine a situation in which the rule could be invoked.

Respondents wish to make it clear that it is not alleged in the bill of complaint nor has it been contended by the respondents at any time that the Chicago decree is conclusive and binding for any purpose other than the necessity for and the amount of the assessment. Any defendant in this case is entitled to all other defenses, such as showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or in equity he is entitled to set off against the assessment, or that he has any other defenses personal to himself. (See *Selig* v. *Hamilton, supra.*)

### Manifest Injustice Would Result From Different Assessments in Different Jurisdictions.

Whether the Chicago decree as to the necessity for and the extent of the assessment is binding upon the petitioners is a question pertaining exclusively to procedure and not to substantive rights. Procedure should be adjusted to serve justice. There can be no doubt that the assessment

made in the *Chicago* Case is correct and just. This assessment was first determined by a Master; it was approved by the District Court; it was upheld by the Circuit Court of Appeals; certiorari was denied by this court. What justice is to be served by taking the same documents and the same witnesses into the various states and jurisdictions where stockholders reside and making the same proof anew? If the assessment was correct in the first instance, presumably assessments in the same amount will be fixed in other jurisdictions. The only possible theory justifying an assessment anew is that it might be fixed in different amounts in different jurisdictions, but this also would result in manifest injustice. The statute upon which the liability is founded provides that the stockholders shall be "equally and ratably and not one for another" responsible for all the debts and engagements of the Bank. If assessments in different jurisdictions are fixed in different amounts, uniformity is destroyed and the stockholders are not held "equally and ratably".

Can the petitioners seriously contend that, had the District Court of Illinois in a suit to which the Chicago Joint Stock Land Bank was a party defendant and in the district where the Bank was domiciled, decreed that only 50 per cent of the stockholders' liability was necessary, it could have been asserted in the subsequent suit brought in Ohio that a 75 per cent, 85 per cent or 100 per cent assessment of the stockholders' liability could be recovered? Yet, if it is held that the decree of the domiciliary District Court of Illinois, determining the amount of the stockholders' liability, is not binding upon that issue in a subsequent suit brought in other districts to enforce this stockholders' liability, the stockholders who are defendants in a subsequent suit might well be assessed a greater amount than the stockholders who were defendants in the district where the joint

stock land bank is domiciled. Such a result does violence to the very terms of the Federal Farm Loan Act, and introduces an element of confusion which is unwarranted by the terms of the Act.

The petitioners and the *Holmberg* Case, *supra,* rely upon the following quotation from *Wheeler* v. *Greene,* 280 U. S. 49, at Page 51:

> "There is not the same need that the stockholder's liability should be summarily disposed of behind his back * * * rather than by the usual proceeding of a bill in equity which is brought in the neighborhood, in which the stockholder can be heard, and by which the assessment instead of one hundred per cent. can be adjusted to the specific case."

The above quotation, however, omits the material words, "in Washington", and has inserted in their place asterisks. By reference to the neighborhood, this Court obviously referred to the domicile of the bank in which naturally many of the stockholders would reside, as contrasted with the administrative board in Washington. It will also be noted that the language quoted speaks not of *assessments* but of an *assessment,* implying that only one assessment should be made.

Before concluding this point, we wish to call to the court's attention the status of the record in the District Court. After this case had been remanded by the Sixth Circuit to the District Court, and before petition for certiorari was presented to this court and before counsel for respondents knew that such a petition was to be presented, the respondents became concerned over the decision in the *Holmberg* Case and decided, as a precautionary measure, to amend their bill and allege the insolvency of the bank, the extent thereof, and the necessity for an assessment against the stockholders without any reference to the Chicago decree, and to make proof of such facts anew at the trial in Ohio, and tendered such an amendment to the District Court, but counsel for petitioners vigorously opposed the motion, and

contended that such an amendment would constitute a departure in the pleadings. The District Court took the motion under advisement and has not yet rendered an opinion or permitted the respondents to file the amendment. If this amendment had been filed, there would have been no ground upon which the petitioners could have sought certiorari to this court on the point here being argued. Therefore, it becomes manifest that the petitioners are not in good faith seeking to have their day in court upon the questions pertaining to the necessity for and the amount of the assessment, but are merely endeavoring by legal technicalities to evade any adjudication as to their liability to the creditors of the Bank. In view of what has occurred in the District Court since the decision by the Circuit Court of Appeals, we respectfully suggest that if this court holds the Chicago decree to have no extraterritorial effect, then it should instruct the District Court to file the amendment which has heretofore been tendered to such District Court.

It is therefore submitted (1) that the Federal Farm Loan Act does not by its terms require a separate assessment to be made in each district where a suit is brought to enforce the stockholders' liability, and (2) since the Chicago decree determining the amount of the assessment was just and correct, that decree is binding upon the stockholders wherever sued, insofar as it determines the amount of the assessment to be asserted against the stockholders.

## Point II.

### THE PROBATE LAWS OF THE STATE OF OHIO ARE NOT PERTINENT.

Petitioners contend in connection with their second Specification of Error that under the probate laws of Ohio no action may be brought to adjudicate a claim against an executor of the estate of a deceased person unless the

claim has first been presented to the executor within four months after his appointment. In the present case many, if not all, of the executors had been appointed more than four months before any claim arose. It would seem to be sufficient answer to the above contention to suggest that a law of any state which bars a claim before it arises is invalid under the Fourteenth Amendment.

Petitioners, however, apparently misconstrue the probate laws of Ohio, for the Supreme Court of that state has held adversely to petitioners' contention. In *State, ex rel. Fulton, Supt. of Banks,* v. *Bremer,* 130 O. S. 227, the court said (page 236):

> "There is no law of Ohio making it mandatory upon a claimant against a decedent's estate to present his claim for allowance before entering suit."

In the case of *Beach* v. *Mizner, Executor,* 131 O. S. 481, cited by petitioners, the claimant chose to present his claim to the executor, but he presented it too late, as was shown by his complaint, and therefore the complaint was held bad on demurrer. However, the statement above quoted from the *Fulton* Case was neither repudiated nor modified in this later case.

Petitioners rely upon *Pufahl, Receiver,* v. *Estate of Parks,* 81 L. Ed. 73, as holding that such local probate laws are binding upon claimants even though they bring their action in a Federal Court.

Petitioners misconceived the decision in that case. In the first place, the claimant there proceeded in the state court and, more important, the question in that case was not whether the claimant had the right to have his claim adjudicated but whether he had the right to participate in the assets of the estate and if so on what basis. In the case here the respondents are merely seeking an adjudication of their claims in the Federal Court, and this Court, in the *Pufahl* Case, discussed a similar situation and in

speaking of the right of a claimant who otherwise had the right to litigate in the Federal Court, said:

> "While he may not be denied his right to prosecute an action to judgment or a suit to final decree in the federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. The marshalling of that claim with others, its priority, if any, in distribution, and all similar questions, are for the probate court upon presentation to it of the judgment or decree of the federal court."

Moreover, the matters under this Specification of Error do not arise on the record. There are no motions to dismiss by either administrators or executors which make any reference directly or indirectly to the Probate Laws of Ohio or any other statute of Ohio. (See motions to dismiss, R. 21-22, 40, 54, 55, 58.)

Furthermore, even though it should be conceded that the suit here would have been barred as against executors and administrators if brought in the Ohio court, or if brought at law in the Federal Court, it does not follow that the respondents would be precluded here. State statutes of limitations are not controlling in actions at equity in Federal Courts. They may be followed in the application of the doctrine of laches. (*Benedict* v. *City of New York*, 250 U. S. 321; *Hall* v. *Ballard*, 90 Fed. (2nd) 939.) But in this case no question of laches was presented to or passed upon by the District Court.

## Point III.

### Answer to argument of petitioners relating to specification of errors 3 to 6, inclusive.

Petitioners, in support of their Specification of Errors 3 to 6, inclusive, argue that:

1. The bill of complaint does not state facts sufficient to constitute a good cause of action in equity, because:

(a) It is a secondary suit to collect a 100 per cent assessment made by the Chicago decree, for which the remedy at law is full and adequate.
(b) There is no trust fund involved.
(c) It is not a true class suit.
(d) A class suit is unnecessary.

2. The complaint does not state sufficient facts to show the required jurisdictional amount either against those defendants holding stock of a par value less than $3,000.00, or against those holding stock of a par value greater than $3,000.00, and, furthermore, the par value of the shares is only $5.00 per share and not $100.00 per share, as alleged in the complaint.

3. The defendants are improperly joined in one cause.

4. There is a defect of parties plaintiff in that the cause of action is in the equity receiver appointed in the Chicago suit.

These contentions, which were made in the Circuit Court of Appeals and there overruled, presuppose in several instances the extraterritorial effect of the Chicago decree. In the Circuit Court of Appeals petitioners not only assumed such extraterritorial effect but asserted it and used this assertion as a foundation upon which to base several of the above contentions. Having failed there, they changed their position and denied such extraterritorial effect in order to come here. Now here, they seek to revert to their arguments below, apparently assuming that this court may decide the question upon which they came against them, and therefore seek to anticipate such a ruling and argue matters, several of which are inconsistent with the contention which brought them here.

We assume that the petitioners, having come into this court contending that the Chicago decree has no extraterritorial effect, will not be permitted to make arguments here which require them to first assume its extraterritorial validity.

However, as these arguments are contained in the peti-

tioners' brief, respondents reply to them in the same order as they are set forth above.

1. BECAUSE OF THE NATURE OF STOCKHOLDERS' LIABILITY CREATED BY THE FEDERAL FARM LOAN ACT, THE PROCEEDING TO ENFORCE SUCH LIABILITY MUST BE A REPRESENTATIVE SUIT IN EQUITY. AN ACTION AT LAW WILL NOT LIE.

(a) *The action could not be brought at law.*

The stockholders' liability sought to be enforced is created by U. S. Code, Title 12, Section 812. Under statutes of this character, which require stockholders to contribute to a special fund for the payment of corporate debts, it has long been settled that an individual creditor may not sue an individual stockholder and appropriate the entire amount of his recovery to the payment of his own debt. Statutes of this character are designed to create a fund for pro rata distribution among all creditors, and one of the creditors may not appropriate to himself what was intended for all.

*Pollard* v. *Bailey*, 87 U. S. 520.
*Terry* v. *Tubman*, 92 U. S. 156.
*Hornor* v. *Henning*, 93 U. S. 228.
*Terry* v. *Little*, 101 U. S. 216.

It necessarily follows that actions such as this must be class suits brought by one creditor for the benefit of all. The fund collected is not payable to plaintiff for his individual benefit, but must be paid to a receiver who makes pro rata distribution under the court's decree. Such a case involves the collection and distribution of a trust fund by a receiver appointed for that purpose. Such a receiver must necessarily be appointed in this case by the District Court in Ohio. Whether or not the Chicago decree is binding upon the defendants in Ohio as to the necessity for and the amount of the assessment, it is quite clear that the equity

receiver appointed in the *Chicago* Case cannot function in Ohio. Necessarily, the action must be in equity. Class suits at law are unknown. The collection and distribution of a trust fund by a judicial receiver is not appropriate in a common law action. The precise question was adjudicated in the *Conway* Cases, *supra,* page 3.

Petitioners rely for the most part upon cases decided under the National Banking Act, which hold that where the Comptroller levies an assessment of 100 per cent against stockholders, and the bank receiver sues to collect such assessment, the remedy is at law. This point was first established in *Kennedy* v. *Gibson,* 8 Wall. 498, and has never been departed from, but the method of enforcing the stockholders' liability under the National Banking Act is entirely different from the method of enforcing the same liability under the Act applicable to Joint Stock Land Banks. Under the National Banking Act the Comptroller of the Currency assesses the stockholders, and the statute expressly permits the receiver to sue to collect these assessments. In such an action by the receiver, the assessment levied by the Comptroller is conclusive. The receiver in such cases sues in his own name as plaintiff to collect the amount assessed by the Comptroller. The judgment in such an action runs to the receiver to whom the money is payable. When the judgment is collected, it is administered by the receiver under the supervision of the Comptroller. There is no class suit, no judicial receiver, and no judicial administration of the fund collected.

The Act involved here is entirely different. No administrative assessment is permitted and the statute does not authorize the statutory receiver to collect the assessment levied against the stockholders. Under the present Act the only permissible method of enforcing the stockholders' liability is by a class suit in equity filed by one or more creditors on behalf of all. (*Wheeler* v. *Greene,* 280 U. S. 49.)

The present action thus diverts from *Kennedy* v. *Gibson, supra,* in that the present action is a class suit to collect and judicially administer a fund through a judicial receiver to be appointed for that purpose. In the *Conway* Cases, to which we have referred, such cases as *Kennedy* v. *Gibson* were expressly distinguished upon this ground. (*Alsop* v. *Conway,* 188 Fed. 568, at page 575.) The *Cago* Case and *Brusselback* v. *Bank* have expressly decided that a court of equity is the proper tribunal.

*(b and c) The suit is a class suit in behalf of all creditors. The amounts collected constitute a trust fund.*

The petitioners say that the suit here is not a true class suit because there is no trust fund involved. The *Cago* Case and *Brusselback* v. *Bank* are to the contrary.

*(d) A class suit is necessary.*

The petitioners next argue that a class suit is unnecessary because under certain provisions of the Ohio Code one or more persons may sue for the benefit of a group and several judgments may be rendered, giving to each plaintiff his proportionate share of the recovery. It is quite unnecessary to consider the adequacy of these statutory remedies, as they have no possible effect upon the equity jurisdiction of the Federal Courts. This latter jurisdiction is fixed by the Federal Judiciary Act of 1789 and such jurisdiction cannot be ousted by state statutes enlarging legal remedies. The remedy at law, which prevents the exercise of equity jurisdiction in the Federal Courts, must be one which existed when the Judiciary Act of 1789 was passed. This is elementary; it is sufficient to refer to 21 C. J. 41, 42, where the authorities are cited and reviewed.

In concluding this point, we submit that if this court holds that the Chicago decree has no extraterritorial effect, then

the present case is in all respects identical with *Brusselback* v. *Bank*, and that decision should control.

On the other hand, if it is held that the Chicago decree is effective and binding as to the necessity for and the amount of the assessment, then the present case is controlled by the decision of the Second Circuit in the *Cago* Case, which held that such suit was properly brought in equity.

2. THE REQUIRED JURISDICTIONAL AMOUNT APPEARS FROM THE BILL OF COMPLAINT.

The petitioners contend, first, that as to those stockholders who own stock of a par value of less than $3,000.00, the court has no jurisdiction. The *Conway* Cases in considering a similar situation held otherwise; the *Cago* Case and *Brusselback* v. *Bank* also held otherwise. All held that the fund sought to be collected determined the jurisdictional amount, and hence the fact that the liability of certain stockholders might be less than $3,000.00 did not deprive the court of jurisdiction as to them.

Petitioners next contend that as to the stockholders who owned stock of a par value of more than $3,000.00, there is no jurisdictional amount, for as against such defendants the plaintiffs have no claim amounting to $3,000.00, and say that even if the amounts claimed from all of the defendants are aggregated, the respondents' claim is for but a fractional part of the alleged total liability and amounts to only $1,422.59. Their calculation is as follows:

The respondents held bonds for the amount of $132,000.00. The total amount of bonds issued and outstanding is $42,000,000.00. The amount sought to be recovered from Ohio stockholders in this suit is $458,900.00, and therefore 132,000/42,000,000ths of $458,900.00 amounts to $1,422.59, which sum is the total amount the respondents may recover from the Ohio stockholders.

The short answer to this contention is that the respond-

ents have a claim for $132,000.00. How much they will recover in Ohio on this claim depends upon how many creditors intervene in the suit. If few creditors intervene, they will recover the full amount of their claim. Furthermore, this same theory was asserted in the case of *Brusselback* v. *Bank*. That suit was originally brought by Brusselback alone. He had bonds of the par value of $4,000.00. The defendants there argued that the total amount to which Brusselback would be entitled in any event would be 4,000/42,000,000ths of $4,000,000.00, the latter figure being the entire extent of the stockholders' liability, and therefore that Brusselback's claim was for only $389.00, which, of course, was less than the jurisdictional amount.

The Circuit Court of Appeals did not discuss this ingenious calculation, but held that as Brusselback had bonds of $4,000.00, his claim was more than sufficient to sustain federal jurisdiction.

Petitioners additionally contend that for the purpose of testing jurisdiction the Bank's shares must be deemed to have a par value of $5.00 and not $100.00 each. The contention is patently unsound for several reasons.

The Federal Farm Loan Act provides for the organization of three distinct classes of corporations, namely, Federal Land Banks, Farm Loan Associations, and Joint Stock Land Banks. Title 12, U. S. C. A., Sec. 692, provides that the capital stock of Federal Land Banks shall be divided into shares of $5.00 each. Section 731 contains a similar provision with respect to Farm Loan Associations, but there is no similar provision in the Act respecting Joint Stock Land Banks. Had Congress intended that the capital stock of Joint Stock Land Banks should be divided into shares of $5.00 each, it would have so provided.

In fact, Congress provided the contrary. Section 811 provides that Joint Stock Land Banks shall be organized subject to the requirements and under the conditions set

forth in Sections 671 to 683. None of these sections contains anything on the subject of the par value of shares. Section 692, which requires the capital stock of Federal Land Banks to be divided into shares of $5.00 each, is not included within these sections. It is thus clear that Joint Stock Land Banks are not subject to the requirement that their shares have a par value of $5.00.

Counsel rely upon Section 813, which provides that:

> "*Except as otherwise provided,* joint stock land banks shall have the powers of, and be subject to all the restrictions and conditions imposed on Federal land banks by this chapter."

But this section does not apply, because it is "*otherwise provided*" in Section 811, which expressly says that Joint Stock Land Banks shall be organized subject to the requirements of Sections 671 to 683. In any event, Section 813 refers to the powers and duties of Joint Stock Land Banks *after they have been organized.* The conditions of their organization are specified in Section 811. Such has always been the practical interpretation of the statute by the Federal Farm Loan Board, and this interpretation was followed in *Todd* v. *Russell,* 1 Fed. Supp. 788. Counsel admit that this is the only case they have found passing on the question, and that it is directly in point against their contention, and merely suggest that the court came to a hasty conclusion. Furthermore, Section 831(a) provides that the Federal Farm Loan Board may charter Joint Stock Land Banks, and authorize them to increase their capital stock. Pursuant to this section, the Board chartered the Bank in question, and authorized such Bank to issue its shares of the par value of $100.00 each. Obviously, the shares were issued in strict conformity with the statute.

Even if the statute could be construed as specifying $5.00 shares, it could not be given the effect contended for by petitioners. The contention is that because the stat-

ute says that the capital stock shall be divided into $5.00 shares, the court must presume, for the purpose of the present assessment, that the shares in question were *actually* $5.00 shares. It is not claimed that the shares were void as violating the statute; the court is merely asked to assume that the shares were $5.00 shares. But such an assumption, if made, would be patently false. The par value of corporate shares measures the amount paid to the corporation for the shares, and equally measures the liability of the corporation to its stockholders. Here, the amount paid was $100.00 per share, and such was the liability of the Bank to its stockholders. Having received $100.00 per share, the Bank could hardly have satisfied its liability to the stockholders by the payment of $5.00 per share. The shares, *in fact*, had a par value of $100.00, and the rights and liabilities of the stockholders must be measured by that fact. Had the shares been issued as $5.00 shares, there would have been twenty times as many shares; the rights and liabilities of the stockholders would have been exactly the same. Counsel say that the Bank violated the statute in issuing $100.00 shares instead of $5.00 shares. Assume it did; the supposed offense is not particularly harmful, and certainly furnishes no sound reason why petitioners should escape 95 per cent of their statutory liability. The statute is not prohibitory in its terms, and should be construed as directory rather than mandatory.

In any event, the stockholders are estopped. They paid the corporation $100.00 per share, and accepted certificates which indicated that the shares had a par value of $100.00. Had the shares been $5.00 shares, the Bank could not have conducted business, for Section 815 requires a minimum capital of $250,000.00, and had the 40,000 shares of the Bank been $5.00 shares, the capital would have been only $200,000.00. Moreover, had the shares been $5.00 shares, most of the bonds would have been unauthorized. Section 814 pro-

vides that bonds may not be issued in excess of fifteen times the amount of a bank's capital and surplus. Had the 40,000 shares been $5.00 shares, the capital would have been $200,000.00, and the limit of the Bank's bonded indebtedness would have been $3,000,000.00. In fact, the Bank issued bonds in excess of $40,000,000.00. The bondholders had a right to rely upon the fact that the Bank had a capital of $4,000,000.00, as was generally understood. Under the circumstances, it is entirely clear that, as against the creditors who relied upon the capital stock as a fund for the payment of their debts, the stockholders who received $100.00 shares are estopped to question the par value thereof.

*Casey* v. *Galli,* 94 U. S. 677, 680; 24 L. Ed. 168.
*Chubb* v. *Upton,* 95 U. S. 665, 668; 24 L. Ed. 523.
*Scott* v. *Deweese,* 181 U. S. 202, 213; 45 L. Ed. 822.

Counsel rely upon certain cases which hold that an *ultra vires* contract may not be validated by estoppel. This doctrine may well be applied where a corporation performs some act which is entirely beyond its corporate powers. Here, the act performed was the issuance of shares, which the corporation had a perfect right to do. The mistake, if any, was in the manner of the performance. At most, the Bank issued a certificate for one share of the par value of $100.00, instead of twenty shares of the par value of $5.00. The act was not *ultra vires* within the meaning of the cases cited by counsel.

Finally, the court in the *Chicago* Case, which levied the assessment, found that the shares had a par value of $100.00, and assessed the stockholders for $100.00 per share, the Circuit Court of Appeals affirmed and this court denied certiorari. Respondents contend that this decree is conclusive as to the assessments on all stockholders. If such decree is not conclusive and the shares are now held to have a par value of $5.00 each, the Illinois stockholders

who have paid on the basis of $100.00 per share have certainly suffered a grave injustice.

3. THE DEFENDANTS ARE PROPERLY JOINED IN THE SUIT.

Petitioners contend that "there are 145 separate debtors who were sued together in this action as defendants with no excuse therefor save that they are all stockholders of the Chicago Bank." The "excuse" is sufficient. The same contention was made in the *Conway* Cases, and in the *Cago* Case and repudiated.

4. THERE IS NO DEFECT OF PARTIES PLAINTIFF. THE RECEIVER APPOINTED IN THE CHICAGO CASE COULD NOT BRING THE ACTION.

To sustain their sixth Specification of Error the petitioners argue that there is a defect of parties plaintiff. The contention is that the present action should have been brought by the receiver appointed by the Chicago court, but in the absence of statutory authorization it is well settled that such a receiver may not sue outside the jurisdiction of his appointment.

*Booth* v. *Clark,* 17 How. 322; 15 L. Ed. 164.
*Hale* v. *Allinson,* 188 U. S. 56.
*Sterrett* v. *Bank,* 248 U. S. 73.
*Rockwood* v. *Foshay,* 66 Fed. (2nd) 625; certiorari denied, 291 U. S. 66.

It is true that where a statute makes the receiver assignee of the rights of creditors, he may sue in a foreign jurisdiction.

*Bernheimer* v. *Converse,* 206 U. S. 516.
*Converse* v. *Hamilton,* 224 U. S. 243.

But the Federal statute in question contains no provision of this character. For this reason the Chicago decree did

not attempt to confer upon the receiver appointed there the right to sue in foreign jurisdictions. It is true that the Chicago decree authorizes the receiver to collect from foreign stockholders and to give acquittances to those making payments. This, as we have previously pointed out, merely gave to the receiver appointed in the *Chicago* Case the right to receive payments voluntarily made by foreign stockholders. The decree did not authorize such receiver to sue in foreign jurisdictions and in the absence of an enabling act such a provision would not have been valid. (See authorities above cited and also *Wheeler* v. *Greene*, 280 U. S. 49, which held that the creditors' rights against stockholders must be enforced by the creditors.)

## Conclusion.

Respondents respectfully submit that the decree of the United States District Court of the district where the Chicago Joint Stock Land Bank is located, determining the necessity for and the amount of the assessment to be collected against the stockholders of the Chicago Joint Stock Land Bank, is binding upon the stockholders wherever located and that the petitioners' Specification of Errors 2 to 6, inclusive, are entirely without merit, and therefore the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

J. Arthur Miller,
George R. Murray,
*Solicitors for Respondents.*

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# SUPREME COURT OF THE UNITED STATES.

No. 108.—October Term, 1937.

Andrew J. Christopher, Third National Bank & Trust Co., as Executor of the Estate of George Weimer, Deceased, et al., Petitioners,
*vs.*
W. E. Brusselback and W. I. Bell, et al., etc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[January 3, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Respondents, creditors of a Federal Joint Stock Land Bank located in Illinois, brought the present suit in the district court for ~~western~~ Southern Ohio to collect a 100% assessment of the statutory double liability of its shareholders, which had previously been decreed in a suit brought by respondents in the district court for northern Illinois. In the Illinois suit the bank and all its stockholders were named as parties defendant, but the present defendants, petitioners here, who are stockholders residing in Ohio, were not served with process. A motion in the district court to dismiss the present suit raised the question whether the bill of complaint, which sets up the decree of the court in the Illinois suit in which it states petitioners were not served with process, but does not allege that the bank is insolvent or show any necessity for the assessment, states a cause of action. The district court gave judgment for petitioners which the Court of Appeals for the Sixth Circuit reversed. *Brusselback* v. *Arnovitz*, 87 F. (2d) 761. We granted certiorari, — U. S. —, to resolve a conflict between the decision of the court below and that of the Court of Appeals for the Second Circuit in *Holmberg* v. *Carr*. 86 F. (2d) 727. Compare *Brusselback* v. *Cago Corporation*, 85 F. (2d) 20.

The question decisive of the case is whether petitioners are bound by the Illinois adjudication, in their absence, of the bank's insolvency, and the amount of the assessment. Section 16, Federal Farm Loan Act, July 17, 1916, c. 245, 39 Stat. 374, 12 U. S. C.

§ 812, provides, "Shareholders of every joint stock land bank organized under this Act shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

Before respondents had brought the Illinois suit this Court in *Wheeler* v. *Greene,* 280 U. S. 49, had before it the provisions of the Federal Farm Loan Act which authorize the Farm Loan Board to declare a Joint Stock Land Bank insolvent, and to place it in the hands of a receiver. Section 29, Federal Farm Loan Act, July 17, 1916, c. 245, 39 Stat. 381, 12 U. S. C. §§ 961, 963. We held that those provisions do not confer upon the Federal Farm Loan Board any power to levy an assessment on the stockholders, or give to the receiver authority to maintain suit for the enforcement of their statutory liability, or otherwise set up any machinery comparable to that of the National Banking Act for enforcing the stockholders' liability. Compare *Rankin* v. *Barton,* 199 U. S. 228, 232; *Casey* v. *Galli,* 94 U. S. 673, 681. The only means of enforcing the liability left to creditors of a Joint Stock Land Bank, as the Court pointed out in the *Wheeler* case, is an adversary suit in equity against the stockholders wherever they may be found.

The obligation which the statute imposes upon the stockholders is personal, and petitioners can be held to respond to it only by a suit maintained in a court having jurisdiction to render a judgment against them *in personam.* As the liability of the stockholders is to pay the debts of the bank to creditors "equally and ratably", judicial determination of the inability of the bank to pay its debts and the amount to be assessed against the stockholders to meet the deficiency are prerequisites to the enforcement of liability, and are essential parts of the only cause of action which the statute gives to the creditors. It is plain that in such a suit the existence and extent of insolvency are facts, the allegation and proof of which cannot be dispensed with as to any stockholder unless, as between the parties to the suit, they are matters already adjudicated.

A stockholder is so far an integral part of the corporation of which he is a member, that he may be bound and his rights foreclosed by authorized corporate action taken without his knowledge or participation. *Sanger* v. *Upton,* 91 U. S. 56, 58. The subscriber

to corporate stock, whose subscription is payable on call of the directors, as required for corporate purposes, is bound by the action of the board in making the call as he is bound by a valid decree of a court against the corporation, although made in his absence, which directs performance of the corporate duty to make the call. *Hawkins* v. *Glenn,* 131 U. S. 319, 329; *Great Western Telegraph Co.* v. *Purdy,* 162 U. S. 329, 336; cf. *Kerrison* v. *Stewart,* 93 U. S. 155. Similarly, where a procedure is authorized by statute, under which a corporation may be brought into court for determination of its insolvency and the amount to be assessed against stockholders for the payment of its debts, and the judgment is declared by statute to be binding upon them, they are deemed by virtue of their membership in the corporation to have so far subjected themselves to the prescribed procedure and its consequences as to be bound by the determination although not nominal parties to the proceeding. *Bernheimer* v. *Converse,* 206 U. S. 516; *Converse* v. *Hamilton,* 224 U. S. 243; *Selig* v. *Hamilton,* 234 U. S. 652; *Marin* v. *Augedahl,* 247 U. S. 142; *Chandler* v. *Peketz,* 297 U. S. 609.

Whether it be said that by purchasing or retaining his stock in the face of such a procedure the stockholder has consented that the corporation represent him for the purposes of the adjudication, *Bernheimer* v. *Converse, supra,* 529, 532, 533; *Marin* v. *Augedahl, supra,* 150, or more realistically that as stockholder he has voluntarily assumed a corporate relationship which is subject to the local regulatory power, in the exercise of which the procedure has been attached, as an incident, to his membership in the corporation, *Converse* v. *Hamilton, supra,* 260, in either case the procedure conforms to accepted principles, involves no want of due process, *Converse* v. *Hamilton, supra; Selig* v. *Hamilton, supra; Chandler* v. *Peketz, supra,* and at least when it ripens into a judgment is entitled to full faith and credit. *Marin* v. *Augedahl, supra.* It is enough that in every case the stockholder has assumed or retained his membership in the corporation after the warning of the statute, or of rules governing the corporation, of which he knew or had opportunity to know, that the benefits of membership carry with them the risk that the corporation may stand in judgment for him.

In the present case no such warning has been given, for no such procedure has been prescribed. The statutes have fixed only the conditions on which liability of the stockholders is to attach, leav-

ing to creditors as their only recourse the usual procedure of courts as the means of asserting the liability. There is nothing in the statute relating to the organization of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their membership in the corporation the stockholders can be said to have subjected themselves to a procedure for determining in their absence the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment. As we cannot say that petitioners' membership in the bank was conditioned upon their surrender of the benefits of a procedure which would otherwise be required, there is no basis for a court to dispense with it more than in other cases in which a personal judgment is sought.

Equity Rule 38, providing that in a class suit "one or more of a class may sue or defend for the whole", was adopted in the exercise of the authority conferred on this Court by R. S. § 913, and of its own inherent power to regulate by rules "the modes of proceeding in suits of equity." Their purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction. The omission from old Rule 48 amended and promulgated as Rule 38 in 1914, 226 U. S. 659, of the phrase " . . . the decree shall be without prejudice to the rights and claims of all absent parties" preserved unimpaired the jurisdiction of federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court. *Smith* v. *Swormstedt*, 16 How. 288; cf. *Hartford Life Insurance Co.* v. *Ibs*, 237 U. S. 662, 672.

In the circumstances the decree in the Illinois suit was not *res adjudicata* as to petitioners in any respect. For that reason the bill of complaint failed to state a cause of action, and the decree is

*Reversed.*

Mr. Justice BRANDEIS and Mr. Justice CARDOZO took no part in the consideration or decision of this case.